(2) No. 89-1028

Supreme Court, U.S.
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Supreme Court of the United States
October Term, 1989

CSX TRANSPORTATION, INC.,

Petitioner,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 25, 1989 Decided July 25, 1989

No. 88-1724

BROTHERHOOD OF RAILWAY CARMEN, et al., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

CSX TRANSPORTATION, INC., INTERVENOR

No. 88-1694

AMERICAN TRAIN DISPATCHERS' ASSOCIATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA, RESPONDENTS

NORFOLK & WESTERN RAILWAY CO. and
SOUTHERN RAILWAY CO., INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

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Before: WALD, *Chief Judge*, and EDWARDS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: The Brotherhood of Railway Carmen and the American Train Dispatchers' Association petition for review of orders of the Interstate Commerce Commission issued in separate proceedings before that agency. We dispose of the two cases together because they raise common issues with respect to the ICC's authority to exempt a party to a merger between railway carriers subject to approval under § 11344 of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (the Act), from the provisions of (1) a Collective Bargaining Agreement (CBA); and (2) the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

Because we conclude that the ICC has misperceived, in one important respect, the scope of its exemptive power, we grant each petition for review in part, and remand the cases to the ICC for further proceedings.

I. FACTUAL BACKGROUND

The operative facts of the two transactions here at issue, and the background of the respective administrative proceedings, are as follows:

A. *The Carmen's Case*

In 1980, the ICC approved a proposal under which CSX Corporation, a newly-formed holding company, would acquire control of two other holding companies: (1) the Chessie System, Inc., the principal railroad subsidiaries of which were the Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company; and (2) Seaboard Coast Line Industries, Inc., the parent of the Seaboard Coast Line Railroad (Seaboard) (later to become CSX Transportation, Inc., or CSX). *CSX Corporation—Control—Chessie System, Inc., and Seaboard Coast Line Industries, Inc.*, 363 I.C.C. 521 (1980) (*CSX Control*).

In its order approving the transaction, the ICC imposed upon the parties a standard set of labor-protective conditions, as required by § 11347 of the Act, 49 U.S.C. § 11347. *CSX Control*, 363 I.C.C. at 588-92, 604. As usual in merger cases, the applicable conditions were transplanted from the ICC's decision in *New York Dock*, 360 I.C.C. 60, 84-90 (1979), *aff'd*, *New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). Section 4 of the *New York Dock* conditions establishes procedures for the resolution—by means of negotiation and, failing that, binding arbitration—of any labor dispute arising from an ICC-approved railroad consolidation. Accordingly, § 4 requires a "railroad contemplating a transaction which . . . may cause the dismissal or displacement of any employees, or rearrangement of forces [to] give at least ninety . . . days written notice . . . ." Section 2 is a status quo provision:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and

> benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements.

In 1986, CSX, invoking § 4 of the *New York Dock* conditions, notified the labor organizations representing its employees that it intended to close its freight car repair shop at Waycross, Georgia, and to transfer the work performed there to the C&O repair shop at Raceland, Kentucky, and that the transfer would result in a net decrease in available jobs at the two shops. The Brotherhood then attempted, on behalf of certain CSX employees who would be affected by the transfer, to negotiate an agreement governing the labor-related changes that the Waycross-Raceland consolidation would require.

Relations between the Brotherhood (and other unions) and CSX were governed by a CBA—known as the "Orange Book"—that they had negotiated in connection with the 1967 merger that created Seaboard; CSX and the Brotherhood continued to observe these terms after the 1980 *CSX Control* transaction. The Orange Book provides, with exceptions not here relevant, that the carrier will employ each covered employee for the remainder of his working life, and that no covered employee "shall be deprived of employment or placed in a worse position with respect to compensation, rules, working conditions, fringe benefits or rights and privileges pertaining thereto at any time during such employment." In consideration for this job protection, the Orange Book gives the carrier the right "to transfer the work of the employees protected [t]hereunder throughout the merged or consolidated [i.e., Seaboard] system . . . ."

The negotiations between CSX and the Brotherhood failed due to disagreements as to (1) whether displaced Waycross employees would retain their Orange Book right to lifetime income; and (2) whether (a) the Waycross-Raceland consolidation would result in a change in

working conditions, and, if so, (b) CSX would be required to comply with the terms of § 6 of the RLA, 45 U.S.C. § 156, and thus to bargain before effecting the change. The Brotherhood then invoked the mandatory arbitration provision of the *New York Dock* conditions, but shortly thereafter, reversed its position and claimed that because the shop consolidation was not contemplated by the *CSX Control* transaction, the *New York Dock* conditions were not applicable at all. By then, however, CSX had invoked arbitration under the *New York Dock* conditions, and the matter came before a three-member arbitration panel (the *Carmen* Committee), with the Brotherhood participating under protest.

In the proceedings before the Committee, it became clear that CSX sought not only to transfer *work* from Waycross to Raceland and to reduce the total number of positions, but also (1) to transfer certain Waycross *employees* to employment by the C&O in Raceland and (2) to remove them from the protection of the Orange Book to coverage under the CBA between the C&O and the Union, which apparently does not contain a lifetime income clause. The Committee held that the Orange Book prohibited CSX from transferring either work or employees outside the Seaboard system created by the 1967 merger. The ICC did not pass upon that determination, but CSX, which has intervened in this appeal, does not dispute it.

The Committee then held, however, that (1) it had the power, "[a]s a quasi-judicial extension of the ICC" to abrogate provisions of a CBA, and to relieve CSX from any requirement of the RLA, that stood in the way of an operational change, such as the shop transfer, that was "authorized or required" by—though not specifically referenced in—the *CSX Control* decision approving the 1980 merger; and (2) it would (a) abrogate the Orange Book prohibition on the transfer of work, but not on the transfer of employees, outside the old Seaboard system,

and (b) exempt CSX from the RLA insofar as it might require the carrier to bargain before unilaterally changing the Orange Book with respect to the work transfer.

The ICC upheld the Committee in other respects, but reversed the Committee's decision not to abrogate the Orange Book prohibition on the transfer of employees as well as work. The ICC further held that, to the extent that switching CSX employees from the Orange Book to the CBA at Raceland would deprive them of their right to income for life, that right would be abrogated. It did not pass upon the question whether the Orange Book did in fact prohibit the transfer of either work or employees but assumed as much.

In its petition for review, the Brotherhood challenges the ICC's authority under the Act to override provisions of the Orange Book and of the RLA. It also claims that the ICC's decision, insofar as it overrides the Orange Book, violates the Compensation Clause of the Fifth Amendment to the Constitution. Finally, it challenges the standard of review that the ICC applied in reversing the Committee's ruling against employee transfers.

B. *The Dispatchers' Case*

In March 1982, the ICC approved the application of NWS Enterprises, Inc. (now Norfolk Southern, or NS), a holding company, to acquire control of two previously separate carriers—the Norfolk and Western Railway Company (N&W) and the Southern Railway Company (Southern). *Norfolk Southern Corp.—Control—Norfolk & Western Ry. Co.*, 366 I.C.C. 173 (1982) (*NS Control*). As in *The Carmen's Case*, the ICC imposed upon the parties to the transaction the standard *New York Dock* conditions. *Id.* at 231.

The American Train Dispatchers' Association was the bargaining representative of certain N&W employees responsible for power distribution. In September 1986,

N&W and Southern informed the Association that they intended "to coordinate certain [N&W] work performed in the System Operations Center . . . in Roanoke, Virginia into the [Southern] Control Center in Atlanta, Georgia," and in so doing, to abolish several supervisory positions at Roanoke. The carriers proposed an implementing agreement whereby the affected N&W supervisors would be "given consideration" for employment in new positions as Superintendents in Atlanta. Superintendents there were considered management employees, however, and were not covered by any CBA.

Attempts to negotiate an implementing agreement foundered over the Association's contentions that (1) the carriers' proposal was subject to mandatory bargaining under the RLA; (2) the carriers were required to preserve the right of the transferred employees to representation under RLA § 2, *Fourth*, 45 U.S.C. § 152, *Fourth*; and (3) the affected employees were entitled to retain their rights, including their seniority rights, under the CBA with N&W. The carriers then asked the National Mediation Board to appoint an arbitrator pursuant to the *New York Dock* conditions. As in *The Carmen's Case*, the dispute came before a three-member arbitration committee (the *Dispatchers'* Committee), which ruled in favor of the carriers on each of the disputed issues.

The rationale of the *Dispatchers'* Committee with respect to the CBA and the RLA was essentially the same as that of the *Carmen* Committee. It concluded that (1) it had the power to abrogate any CBA or RLA provision that impeded implementation of the ICC-approved merger of the N&W and the Southern; (2) the transfer of distribution functions, though not specifically considered in the *NS Control* case, was part of the control transaction; and (3) apparently because application of the N&W CBA to Superintendents at Southern would impede the transfer, transferred employees could not retain their rights under that CBA.

On June 6, 1987, after the ICC had denied the Association's application for a stay of the Committee's award, the carriers effected the work transfer authorized thereby. On June 10, 1988, the ICC affirmed the Committee in all respects, stating, in particular, that the Committee's third ruling was supported by the record insofar as "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function." The ICC also rejected the Association's claim that the transfer would deprive the employees of their right to representation under Section 2, *Fourth* of the RLA, reasoning that "[the Association's] rights as an incumbent bargaining representative are for determination by the National Mediation Board."

In its petition for review, the Association maintains that the ICC lacks authority under the Act to relieve the carrier of its obligation under the RLA and its CBA, and that its decision depriving the employees of their rights under the CBA violates the Compensation Clause of the Fifth Amendment.

II. Legal Background

Before taking up the merits of this dispute, we discuss briefly the relevant statutory framework, the agency's position below, and its claim to *Chevron* deference for that position in this court.

A. *Statutory Background*

Sections 11341 and 11344 of the Act require that the parties to certain transactions listed in § 11343, including carriers proposing to merge, first get ICC approval. 49 U.S.C. §§ 11341, 11343, 11344(a), (c). Under § 11344(c), the ICC must approve any such proposal "when it finds the transaction is consistent with the public interest." As noted earlier, § 11347 requires that

it also impose upon the merging carriers certain labor protective conditions; and it generally meets this requirement by imposing the *New York Dock* conditions described above.

Section 11341(a) provides that upon ICC approval of a § 11343 transaction:

> A carrier . . . participating in that approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). This is the so-called immunity provision at the center of this case.

B. *The Agency's Position*

In its decisions in these cases, the ICC asserted that it has the power, which devolves upon an arbitration committee convened under § 4 of the *New York Dock* conditions, to relieve a party to a § 11343 transaction from any provision of a CBA or of the RLA that stands in the way of implementing that transaction. Its rationale for this assertion was less than clear, however, due largely to its failure to analyze separately the statutory provisions upon which it relied and their relation to the specific rights it purported to abrogate.

1. *Collective Bargaining Agreements*

The ICC appears to have relied upon two bases for its claim that it may abrogate the provisions of a CBA. First, it cited the immunity provision, § 11341(a), stating that it empowered an arbitrator appointed under the *New York Dock* conditions "to override existing agreements by requiring the work and employees to be moved . . . ." *Carmen*, Joint Appendix (J.A.) 204; *id.*

at 207 (Committee correctly understood ICC's view to be that § 11341(a) overcomes "all legal obstacles preventing implementation" of an approved § 11343 transaction); *accord Dispatchers*, J.A. 290-91. As both Committees noted, the ICC had come to this position only recently, in *Denver and Rio Grande Western R.R. Co.—Trackage Rights—Missouri Pacific R.R. Co.*, Finance Docket 30,000, *served* Oct. 25, 1983 (*DRGW*), *rev'd sub nom Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987). *Cf. Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 170 (1967) (immunity provision does not relieve carrier from CBA limitation on transfer of employees).

In *The Carmen's Case*, the ICC appeared also to rely upon § 4 of the *New York Dock* conditions, which it read as supporting the Committee's ruling that it had "the absolute authority . . . to effect changes in work and employee assignments," notwithstanding any CBA provision to the contrary. J.A. 207.

The ICC renews each of these theories on appeal.

2. *The Railway Labor Act*

The ICC also appears to have advanced two sources for its power to override the RLA. First, it stated that the immunity provision exempts the parties to an approved § 11343 transaction from any RLA procedure that might impede the effectuation of the transaction. *Carmen*, J.A. 204-05, 207 (recounting, and apparently approving, the Committee's conclusion "that, under the immunity provisions of [§] 11341(a), implementation of transactions that we authorize under [§] 11343, such as *CSX Control*, supersede employee protections under the RLA"); *accord Dispatchers*, J.A. 290. The ICC had reached similar conclusions in *DRGW*, *supra*, and in *Union Pacific Corp., Union Pacific R.R. Co. and Missouri Pacific R.R. Co.—Control—Missouri-Kansas-Texas R.R. Co., et al.*,

4 I.C.C. 2d 409, 514 (1988), a petition for review of which is currently pending before this court, *see Railway Labor Executives Ass'n v. ICC*, No. 88-1391 (argued April 28, 1989).

Second, the ICC stated that "[t]he mandatory arbitration provisions of *New York Dock* take precedence over the RLA dispute resolution procedures in transactions approved by this Commission . . . ." *Dispatchers* J.A. 289; *accord Carmen*, J.A. 204. As we read it, the ICC's position was that when Congress enacted the current version of § 11347, which incorporates by reference a set of dispute resolution procedures culminating in mandatory arbitration, it intended those procedures to be exclusive where they applied. Although it nowhere expressly abandons this theory, the ICC does not argue it in this court; it relies solely upon its § 11341(a) theory.

C. *Chevron Deference*

The ICC argues that its interpretation of the relevant provisions of the Act is entitled to deference under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), and that we should therefore uphold that interpretation as long as it is reasonable. We agree that *Chevron* applies to the ICC's reading of the statute that it is charged with implementing. *Chevron* establishes, however, two steps for judicial review of an agency's interpretation of law: we do not proceed to the question whether the agency's interpretation is permissible, and thus entitled to deference, unless we have first determined, based upon the language of the statute and the "traditional tools of statutory construction," *id.* at 843 n.9, that Congress has not "directly spoken to the precise question at issue . . .; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. We strike out first in search of

Congress's intent in enacting the immunity provision of the Act.

III. Analysis

"In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988). We begin, as always, with the relevant portion of the statute (§ 11341(a)):

> . . . A carrier or corporation participating in or resulting from a transaction approval by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control of franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is *exempt from the antitrust laws and from all other law, including State and municipal law*, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

A. *Collective Bargaining Agreements*

We cannot sustain the ICC's position that this provision empowers it to override a CBA. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from "the antitrust laws and from all other law" to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to "contracts," much less any specific reference to CBAs. Nor has the ICC explained how we can read the term "other law," as it has done, to mean "all legal obstacles." *Dispatchers*, J.A. 207. None of the Supreme Court decisions, discussed

below, authorizing the ICC to abrogate an "other law" even suggests that the term means "all legal obstacles." The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. *See Gulf, Mobile & Ohio R.R. Co.—Abandonment*, 282 I.C.C. 311, 335 (1952) ("None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.").

Moreover, the ICC's proposed insertion of "all legal obstacles" into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. *Cf. Gulf, Mobile & Ohio*, 282 I.C.C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its "contractual obligations for the payment of rent"). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act.

Perhaps we could tolerate the ICC's reading if it found strong support in either the "design of the statute as a whole," *K Mart*, 108 S.Ct. at 1817, or in its legislative history. We find nothing there upon which to sustain it, however; if anything, both tend to support the meaning conveyed by the words of the statute itself.

Congress first introduced the immunity provision, in a somewhat different form, in 1920. Transportation Act, 1920, 66th Cong., 41 Stat. 456, 482 (1920) (amending § 5 of the Act) (1920 Act) § 407. In the 1920 Act,

Congress deputized the ICC to design a master plan to consolidate the nation's railroads into a limited number of strong systems; the plan was to be implemented by voluntary action on the part of the carriers. 41 Stat. 481 (§§ 5(4), 5(6), *See generally Schwabacher v. United States*, 334 U.S. 182, 191-93 (1948). It also, for the first time, gave the ICC exclusive jurisdiction to approve railroad consolidations; the agency was directed to approve any proposed consolidation that it found to be consistent with (1) its master plan; and (2) the public interest. (Congress removed the first criterion when, in 1940, it discarded the idea of a master plan. *See id.* at 193.)

The immunity provision of the 1920 Act provided that:

> The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and *they are hereby, relieved from the operation of the "antitrust laws," . . . and of all other restraints or prohibitions by law, State or Federal,* in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

41 Stat. 482 (§ 5(8) (emphasis added)).

It is reasonably clear from the history of the 1920 Act what Congress intended the immunity provision to accomplish. In 1917, President Wilson, in the exercise of his wartime powers, had taken possession of the railroads, in part to consolidate them into a unified transportation system in aid of the national defense. *See* Priorities Act, 65th Cong., 40 Stat. 272 (1917); Federal Control Act, 65th Cong., 40 Stat. 451 (1918). *See generally 32d Annual Report of the Interstate Commerce Commission* (1918) (*1918 Annual Report*) at 1-2. Prior to that time, the ICC's authority over the railroads was relatively limited; the States, on the other hand—through

their ratemaking commissions, their corporation laws, and their police powers—intensively regulated the carriers' rates, finances, and operations. Whereas state regulation had at first severely hampered efforts to enlist the railroads in the war efforts, *Schwabacher*, 334 U.S. at 191, during the period of nationalization, neither state nor federal law stood in the way of the Government's purpose to further the war effort.

In 1920, when the period of federal control was about to end, Congress thought it imperative to the transportation needs of the nation that a program of coordination and consolidation be continued; this it chose to pursue, in part, by facilitating voluntary consolidations in accordance with the master plan the ICC was to develop. *Id.* at 191-94. *See* H. Rep. No. 456, 66th Cong. at 6-7, 18-19 (1919); H. Rep. No. 650, 66th Cong. at 643-64 (1920). *See generally* I.L. Sharfman, *The Interstate Commerce Commission* 153-70, 183 (1931). The carriers' return to private ownership, however, would bring with it two complications.

First, they would be again subject to regulation by the uncoordinated and often unfriendly state commissions and legislatures. As the Supreme Court stated in *Transit Commission v. United States*, 289 U.S. 121, 127 (1933):

> . . . Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation has been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for.

See also Texas v. United States, 292 U.S. 522, 530-31, 534-35 (1933) (in order "to insure an adequate transportation system" Congress gave the ICC power "to au-

thorize consolidations, purchases, leases, operating contracts, and acquisition of control," to the exclusion of state laws that would burden the ICC's master plan).

Second, they would be newly subject to regulation by the recently invigorated antitrust laws of the federal Government itself; the Supreme Court had recently held that § 1 of the Sherman Act made unlawful any merger between carriers that eliminated competition to even a limited extent. *See United States v. Union Pacific R.R. Co.*, 226 U.S. 61, 88-89 (1912).

Congress addressed both of these problems with the immunity provision of the 1920 Act. First, Congress placed in the ICC, and removed from the antitrust courts, the duty of considering the anticompetitive effects of any merger proposed to it. 41 Stat. 481 (§ 5(4)) (ICC master plant to preserve competition "as fully as possible"); *McLean Trucking Co. v. United States*, 321 U.S. 67, 73-78 (1944). Second, Congress continued its wartime policy to centralize supervision of the nation's railroads and to eliminate conflicting state authority; thus, for example, ICC-approved consolidations could go forward, aided by the immunity provision, free of interference by the States. This general, centralizing sentiment was echoed in other sections of the 1920 Act, which gave the ICC authority, notwithstanding contrary state law, to (1) approve any extension, construction, or abandonment of tracks, *see* 41 Stat. 477-78 (§§ 1(18), 1(20)); *Transit Commission*, 289 U.S. at 126-28; (2) reject or permit any proposed issuance of securities, 41 Stat. 494-95 (§§ 20a(2), 20a(7)); and (3) adjust rates it deemed unduly preferential or discriminatory, *id.* at 484 (§ 13(4)).

The ICC applied the immunity provision of the 1920 Act to exempt merging carriers from a wide variety of state law impediments. *See, e.g., Clinchfield Ry. Lease*, 90 I.C.C. 113, 134 (1924) (constitutional bar to foreign

corporation operating railroad in state); *Control and Operation of Louisiana & Arkansas Ry. Co.*, 150 I.C.C. 477, 487 (1929) (law forbidding consolidation, stock ownership, or lease of parallel or competing lines); *Control of San Antonio & Arkansas Pass Ry. by Southern Pacific Co.*, 94 I.C.C. 701, 704 (1925) (local corporate headquarters requirement); *Lease of Louisville, Henderson & St. Louis Ry. by Louisville & Nashville R.R. Co.*, 150 I.C.C. 741, 743-44 (1929) (law giving minority stockholders appraisal rights prior to sale of corporate property). And the Supreme Court consistently upheld its application. *See, e.g., Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 124-27 (1948) (local incorporation law); *Texas v. United States*, 292 U.S. at 531-35 (local corporate headquarters).

Thus, in the 1920 Act, Congress "made a new departure," *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563, 585 (1922), pressing for consolidation of the nation's railroads in a legal environment that had long been hostile to such a notion. When, upon the recommendation of the ICC, *see Extension of Tenure of Government Control of the Railroads: Hearings Before the Committee on Interstate Commerce, United States Senate on the Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control*, 65th Cong., Vol. 1 at 231-305, 339-377 (1919) (remarks of ICC Commissioner Edgar E. Clark); *Return of the Railroads to Private Control: Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 4378*, 66th Cong. at 8-139, 2857-2966 (1919) (same), it enacted into law a voluntary consolidation/immunity program—which the ICC had originally advocated in 1917, *see Report of the ICC to the Senate and House of Representatives*, 56 Cong. Rec. 45, 65th Cong., H. Doc. 503 (Dec. 5, 1917) (reprinted in *1918 Annual Report* at 5-7)—it clearly meant to change that legal environment.

From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract. *Cf. Association of Flight Attendants v. Delta Air Lines, Inc.*, No. 87-7040, slip op. at 23 (D.C. Cir. July 18, 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties.

Moreover, in the legislative debates both on the 1920 Act and in 1926, when in the RLA it provided a framework for the regulation and enforcement of CBAs in the railroad industry, Congress exhibited a healthy respect for privately negotiated contracts; it rejected, for example, an amendment to the [illegible] that would have granted the ICC the power to suspend excessively generous wage agreements between carriers and their employees, in part on the ground that legislation abrogating labor agreements would be unconstitutional, *see* 67 Cong. Rec. 8884-86, 8892-93, 8896-97, 9190-91, 9196-97 (1926), and in part on the grounds that "there was a fundamental objection to making changes of a substantive nature in the agreement which the parties had reached," and that "[i]f agreement is to be resorted to [as a means of resolving labor management disputes], . . . the agreement should not be destroyed by placing in the act provisions which would have that effect." S. Rep. No. 606, 69th Cong. at 5-6 (1926). And never, on the several occasions when Congress has revisited the immunity provision, has it either broadened that provision so as to reach "all legal obstacles" to an ICC-approved transaction, or acted more specifically to bring "contracts" or

"collective bargaining agreements" within the reach of the statute.

Against this history as background, we can not impute to Congress the intention to make the bargained-for provisions of a CBA contingent upon their not later becoming inconvenient to the full realization of operating economies that a merger might make possible. *Cf. Association of Flight Attendants, supra*, slip op. at 23. We recognize that other forces may operate to abrogate a CBA in the post-merger context, as, for example, when the NMB, pursuant to its power under § 2, *Ninth* of the RLA, 45 U.S.C. § 152, *Ninth*, decertifies a union following an operational merger. *See, e.g., International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 161 (5th Cir. 1983). We simply do not think that Congress has lodged any such power in the ICC, particularly where, as in each of these cases, the CBAs at issue survived the ICC-approved merger and were not, apparently, questioned by the parties thereto until the present disputes arose—several years after the merger.

B. *The Railway Labor Act.*

At least one court of appeals has held that the immunity provision of the Act may operate to override provisions of the RLA. *Brotherhood of Locomotive Engineers v. Chicago & Northwest Ry. Co.*, 314 F.2d 424, 431-32 (8th Cir. 1963). We decline to address the question here, however, for two reasons.

First. The Unions question whether the ICC has the power to apply the immunity provision at all. They note that § 11341(a) is in terms "self-executing," which we take to mean that its effect is not to be determined by the ICC when it passes upon a transaction, but rather by the appropriate tribunal for the resolution of a particular case in which it is invoked by a carrier as a defense to the application of some "other law." They draw

support for this position from two footnotes in Justice Stevens's concurring opinion in *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 300 nn. 13 & 14 (1987), in which the four Justices to reach the merits so opined.

It is true that the ICC has in the past itself taken this position. *See Chicago, St. Paul, Minneapolis & Omaha Ry. Co. Lease*, 295 I.C.C. 696, 702 (1958) (nothing in the Act "authorizes us to determine and declare the particular laws within the scope of [the immunity provision] from which a carrier shall be relieved. The terms of [the provision] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do. Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act . . . .") (citation omitted).

The ICC's statement in *Chicago, St. Paul* is correct to the extent that it means that the Commission is not *required* to determine what the effect of the immunity provision will be, the Supreme Court has long so held. *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27 (1932); *Claiborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 391 (1922). The Court has also held, however, contrary to the implication of the first-quoted sentence from *Chicago, St. Paul*, that the ICC is *authorized* to make a determination, in approving a transaction, that laws standing in the way of its implementation must give way. *See Seaboard*, 333 U.S. at 124-27; *Texas v. United States*, 292 U.S. at 531-35; *Schwabacher*, 334 U.S. 182. *See also Gulf, Mobile & Ohio R.R. Co. Abandonment*, 282 I.C.C. 311, 335 (1952) (reading above cases as giving it the authority to set aside "State laws which prohibit in some way the carrying out of the transaction authorized"). Thus, we must reject the Unions' argument that the ICC lacks any power to consider a question of exemption that is properly presented to it.

Although the ICC's disclaimer of power in *Chicago, St. Paul* is overbroad insofar as it suggests that the ICC never has the power to determine a particular question of exemption, the result there can be reconciled with the Supreme Court cases cited above. In each of those cases the question of exemption arose before the consummation of the approved transaction; the issue was whether the ICC could, in the course of its approval of the transaction, remove a state law barrier to its effectuation. *See Schwabacher*, 334 U.S. at 200-01 (ICC may override state law granting dissenting stockholders right to block merger); *Seaboard*, 333 U.S. at 121; *Texas v. United States*, 292 U.S. at 531-32. As the Unions correctly note, *Chicago, St. Paul*—like the cases now before us—involved a carrier's request, submitted well after the consummation of the ICC-approved transaction, for exemption from the RLA. The ICC declined the carrier's request, saying:

> It is apparent that the [RLA] has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or operated by the Omaha, and this has been accomplished. The order did not provide any particular method for integration of the physical operations involved, and, except for the imposition of . . . conditions for the protection of employees, did not deal with employer-employee relationships.

295 I.C.C. at 702.

The ICC's broader disclaimer of any power to declare a carrier exempt from a law can thus be understood in the context in which it was presented; as the ICC interpreted the Act in 1958, it was without power to revisit an approved and successfully consummated transaction merely in order to relieve the merged carrier, after the fact, from the burden of complying with the RLA.

Even so understood, however, the ICC's holding in *Chicago, St. Paul* is still inconsistent with its current position; the transactions here at issue had long since been consummated when the ICC undertook to confer upon the merged carriers immunity from the RLA because it affected the "particular method for integration of the physical operations involved . . . ." 295 I.C.C. at 702.

An additional difficulty is presented by the ICC's ruling with respect to the RLA generally. The ICC's interpretation of the immunity provision, as of its 1958 decision in *Chicago, St. Paul*, was that Congress had not given it the power to override the RLA at all. It reaffirmed that view in 1967 in *Southern Railway Co., supra*, when it stated that, in the absence of a stand-by agreement among the affected carriers and unions that would displace their existing CBAs in the event of a rail merger, "section 6 of the [RLA] would seriously impede mergers," 331 I.C.C. at 170-71—a statement that would not make sense if the agency thought it had the power simply to override § 6 "as necessary" to let an approved transaction go forward.

The ICC's current interpretation of the immunity provision departs from this view, but we have found no explanation for the departure, save a citation in *DRGW*—the 1983 case in which it adopted its current stance—and decisions following it, to the Eighth Circuit's 1963 decision in *Chicago & North Western Ry., supra*. Because that case arose out of a dispute between a carrier and the unions representing its employees, however—a dispute to which the ICC was not a party—the court did not have the beenfit of the agency's (then presumably contrary) views on the matter, nor did it cite any ICC precedent in support of its conclusion (apparently because, as of that time, none existed). For the ICC now to reverse its position solely on the basis of the court's holding is somewhat troubling, for three reasons. First,

in 1967, in *Southern Railway Co.*, the ICC was still of the view, the Eight Circuit's intervening decision notwithstanding, that it lacked the authority to override the RLA. Second, in light of the ICC's close involvement with the historical development of the Act, it is disturbing that it would switch its position in unelaborated reliance upon a court case, which raised the issue in a different context and to which it was not a party, without giving any independent consideration to the matter. Third, the ICC has never related its current position to the context of the 1920 Act in which the immunity provisions first appeared; it has not, for example, related the original immunity provision in the 1920 Act to the comprehensive provisions of the same legislation governing labor-management relations, *see* 1920 Act, 41 Stat. 469-74—provisions that were, as we understand the legislative sequence, the immediate precursor to the RLA.

It may be that the ICC has made a conscious decision simply to depart from its earlier precedent. The ICC has not, however, said that it is doing so, much less articulated its reasons. As we stated in *Oil, Chemical and Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 273-74 (D.C. Cir. 1986), "[w]e need hardly elaborate on the settled principle that an agency may not depart from its precedent without explaining and justifying its change in position."

Second. In light of our holding that § 11341(a) does not empower the ICC to override a CBA, it is unclear what are the consequences, if any, of its rulings that the carriers need not comply with the RLA. In *The Carmen's Case*, the heart of the dispute before the ICC was whether either the Commission or, derivatively, the Committee, had the power to relieve CSX from the terms of Orange Book that, as the Committee had interpreted them, prohibited the proposed transfer of work and of employees. The RLA was implicated, as we understand

the dispute, only insofar as the Brotherhood argued that CSX could not unilaterally depart from the Orange Book without first complying with the procedures of the RLA. Because the ICC, in response, started from a premise (that § 11341(a) gave it the power to relieve CSX of its contractual responsibilities) and reached a conclusion (that the RLA could not stand in the way of that power) that we hold was in error, it appears that nothing turns any longer on its conclusion. We remand the case to the ICC for reconsideration, however, in order to enable it to assess the situation in the first instance.

As for *The Dispatchers' Case*, the ramifications of our CBA ruling are somewhat less clear. There the CBA issue was whether the ICC could, by means of the immunity provision, relieve the N&W of obligations under its existing CBA in connection with the transfer of supervisory positions from Roanoke to Atlanta; the ICC said that it could, and we have held that it erred on that point. The RLA issues, as we understand them, were (1) whether the carriers could effect the transfer without first complying with the procedures of the RLA; and (2) whether the transfer, insofar as it deprived employees of rights under their CBA, violated the RLA. The second issue seems to drop out of this case for the same reason as the RLA issue appears to have become irrelevant in *The Carmen's Case*: because we hold that the ICC may not relieve the carriers of obligations under the CBA, the question whether it would violate the RLA to do so is purely hypothetical.

The first issue, if we are correct in stating it—the record on this point is less than crystal clear—may yet be alive. The ICC's opinion, however, gives us pause; it states that the continuation of the old agreement will "jeopardize the transaction"—by which it means not the merger but the transfer to Atlanta—"because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribu-

tion function." J.A. 291. Similarly, the carriers, as intervenors here, note that had the ICC not set aside the Roanoke CBA, its continuation "would have prevented the consolidation from going forward . . . ." Because we hold that the ICC was without authority to set aside that CBA, it is unclear how the carriers will proceed. They may find it both impractical to adhere to the Roanoke CBA in the Atlanta setting, because it would introduce non-uniform work rules, and uneconomical to renegotiate the Roanoke CBA in order to achieve such uniformity; if so, they may determine simply to transfer the employees back to Roanoke. There would then be no issue left, so far as we can tell, regarding their duty to comply with the procedures of the RLA.

In light of this uncertainty as to the effects of our ruling on the continued vitality of the disputes before us, we think it best to remand them for the ICC to determine whether there is any live RLA issue remaining. Should the ICC determine that further proceedings are necessary on the RLA issue, it should, on remand, either provide an explanation for its new position on that issue, or adhere to its prior position.

C. *Other Issues*

We decline to address either the ICC's theory that the labor protective conditions required by § 11347 of the Act are exclusive, or its related assertion, in *The Dispatchers' Case*, that § 4 of the *New York Dock* conditions gives the arbitration committee the "absolute right" to effectuate the transfer of employees, and to override any contrary provisions of a CBA. As noted earlier, the ICC has not argued the first theory to us at all; indeed, in its brief it took the position that the proceedings in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, —— S. Ct. ——, —— (No. 87-1589, slip op. June 21, 1989) (*P&LE*), which was then pending before the Supreme Court, were not relevant here, even though its ex-

clusivity argument before the Supreme Court would appear also to encompass both the § 11347 theory and the § 4 rationale advanced in the decisions here under review. We do not consider as a basis for affirming the decisions a ground upon which the agency places no reliance on appeal. *Cf. SEC v. Chenery Corp.*, 318 U.S. 80 (1943). In any event, we think it best for the ICC, if it has not abandoned its § 11347 and § 4 rationales altogether, to reconsider them in the first instance in light of the Supreme Court's intervening decision in *P&LE* rejecting the ICC's related position.

Because we hold that Congress did not, in enacting § 11341(a), give the ICC the power to override provisions of a CBA, we need not address either the Unions' arguments that to do so would be unconstitutional or their claim that, in amendments to the Act in 1976, Congress specifically preserved employees' contractual rights. Our decision also makes it unnecessary to reach either (1) the Brotherhood's argument in *The Carmen's Case* that the ICC applied an improper standard when it reversed the Committee's ruling in favor of the Union; or (2) the Association's argument that the ICC, in its decision in *The Dispatchers' Case*, deprived employees of their rights under § 2, *Fourth* of the RLA.

IV. Conclusion

Because § 11341(a) of the Act does not grant the ICC its claimed power to override provisions of a CBA between a carrier and its employees, we grant the petitions for review in that respect and reverse the ICC's decision. We remand the cases with respect to the ICC's RLA holdings in order that the agency may determine whether further proceedings are necessary.

It is so ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724 **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE CLERK

BEFORE: Wald, Chief Judge; Edwards and D.H. Ginsburg, Circuit Judges

O R D E R

It is ordered, by the Court, *sua sponte*, that the opinion of the Court filed on July 25, 1989 is amended as follows:

At Page 2, last line

delete the word "cases" and insert in lieu thereof the word "records"

Case Nos.: 88-1724 & 88-1694

At Page 24, line 9

delete the word "case" and insert in lieu thereof the word "record"

At Page 26, last paragraph, line 5

delete the word "cases" and insert in lieu thereof the word "records"

At Page 26, last paragraph

Add the following new text:

See General Rule 15(c).

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724 **September Term, 1989**

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Petitioner
v.
Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner
v.
Interstate Commerce Commission and the United States of America,
Respondents
Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards and D.H. Ginsburg, Circuit Judges

O R D E R

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, that the petitions for review are granted in part and the records herein are remanded to the Commission for further proceedings, in accordance with the Opinion of the Court filed herein this date.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

Date: July 25, 1989

Opinion for the Court filed by Circuit Judge D. H. Ginsburg.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724 **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
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Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards and D. H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of the petitions for rehearing of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724 **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner

v.

Interstate Commerce Commission & USA
Respondents

CSX Transportation, Inc.
Intervenor

No. 88-1694

American Train Dispatchers' Association,
Petitioner

v.

Interstate Commerce Commission and the United States of America,
Respondents

Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

United States Court of Appeals For the District of Columbia Circuit

FILED SEP 29, 1989

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges

O R D E R

The Suggestions For Rehearing *En Banc* of Intervenors CSX Transportation, Inc. and Norfolk and Western Railway Company and Southern Railway Company have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1724 **September Term, 1989**

Brotherhood of Railway Carmen, et al.,
Petitioner
v.
Interstate Commerce Commission & USA
Respondents
CSX Transportation, Inc.
Intervenor

United States Court of Appeals For the District of Columbia Circuit

No. 88-1694

American Train Dispatchers' Association,
Petitioner
v.
Interstate Commerce Commission and the United States of America,
Respondents
Norfolk & Western Railway Co. and Southern Railway Company,
Intervenor

FILED SEP 29, 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Edwards, and D.H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of the petition for rehearing of the Interstate Commerce Commission (ICC) and of the motion of petitioners for leave to file a response thereto it is

ORDERED, by the Court, that the Clerk is directed to file petitioners' lodged response and it is

FURTHER ORDERED, by the Court, that consideration of the aforesaid petition is deferred pending release of the ICC's decision on remand.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: WENDY JEMIS
for Robert A. Bonner
Deputy Clerk

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 28905 (Sub-No. 22)

CSX CORPORATION — CONTROL — CHESSIE SYSTEM, INC. AND
SEABOARD COAST LINE INDUSTRIES, INC.

Finance Docket No. 21215 (Sub-No. 4)

SEABOARD AIR LINE R.R. CO. — MERGER — ATLANTIC COAST LINE R.R. CO.

Decided: June 8, 1988

Arbitration award reversed in part.

DECISION

BY THE COMMISSION:

On April 13, 1987, CSX Transportation, Inc. (CSX) and The Chesapeake and Ohio Railway Company (C&O) jointly filed a petition for administrative review of an arbitration committee's opinion and award in *Brotherhood Railway Carmen - A Division of BRAC* v. *CSX Transportation, Inc., and The Chesapeake and Ohio Railway Company* (LaRocco, March 23, 1987) (*BRC* v. *CSX*). The petition was filed in accordance with our decision in *Chicago and North Western Tptn. Co. —Abandonment*, 3 I.C.C.2d 729 (1987) (the so-called *Lace Curtain* decision).[1] There, we announced our appellate jurisdiction over, and scope of review of, arbitration awards that involve disputes over Commission-imposed labor protective conditions. On May 26, 1987, the Brotherhood Railway Carmen, Division of Brotherhood of Railway & Airline Clerks (BRC) filed an answer and cross-complaint in response to the CSX/C&O petition.[2] On June 15, 1987, CSX and C&O filed an answer to BRC's cross-complaint.

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[1] "Lace Curtain" refers to a moving allowance provided under Article I, secion 9 of *Oregon Short Line R. Co. - Abandonment - Goshen*, 360 I.C.C. 91 (1979), the decision setting forth labor protective conditions imposed in the cited abandonment proceeding.

[2] In *Lace Curtain, supra*, we stated that these petitions for administrative review should be treated as complaints because they allege that the arbitration decisions misconstrued the Interstate Commerce Act and our labor protective conditions.

The arbitration committee was convened under the labor protective conditions we imposed in the lead consolidation proceeding [*CSX Corp. - Control - Chessie and Seaboard Co. I.I.*, 363 I.C.C. 521 (1980) (*CSX-Control*)]. At issue is a dispute concerning CSX/C&O's plan to close a freight car heavy repair shop at Waycross, GA, and to transfer the functions and most of the employees of that facility to a repair shop at Raceland, KY. In *BRC* v. *CSX*, the arbitration committee directed the parties to adopt an implementing agreement governing the repair shop transfer. Under the implementing agreement, the Waycross facility would be closed and the work formerly performed at Waycross and the Waycross employees would be transferred to Raceland, except that employees entitled to the benefits under the so-called "Orange Book" agreement [a labor protective agreement negotiated between a CSX predecessor, Seaboard Coast Line Railroad Company (SCL), and its unions, including BRC] could not be compelled to transfer to Raceland. As described above, CSX then sought review of the award.

We have undertaken a full administrative review of this arbitration proceeding because it involves a dispute under the labor protective conditions imposed in *CSX-Control* and raises significant issues of general importance to that and other consolidation decisions. We are reversing that part of the arbitration committee's decison that created an exception to its prescribed implementing agreement for Orange Book employees. This portion of the decision conflicts with the consolidation transaction authorized in *CSX-Control*.

PRELIMINARY MATTERS

By decision served June 10, 1987, we denied BRC's May 22, 1987, request for a cease and desist order that sought to prevent CSX/C&O from implementing the repair shop transfer. We took under advisement BRC's embraced motion to dismiss CSX/C&O's petition for administrative review. In support of its motion to dismiss, BRC argues that, because CSX/C&O have begun to implement the repair shop transfer under the arbitration committee's decision, they have accepted the decision and waived their right to challenge it.

We are denying BRC's motion to dismiss. CSX/C&O have not waived their right to appeal the arbitration committee's decision. Their petition challenges only the Orange Book employee exception imposed in the arbitration committee's decision. Even though CSX/C&O have held open a sufficient number of positions at the Raceland facility to accommodate Waycross employees covered by the Orange Book agreement, it is clear that CSX/C&O have taken these precautions only to allow them to institute the transfer without breaching their legal obligations under the Orange Book exception should they fail to have it reversed. Thus, CSX/C&O have not acquiesced in the committee's decision.

CSX/C&O request waiver of 49 CFR 1115.2(d), which limits the length of appeals to 30 pages. Part 1115 does not technically apply to this matter. In any event, most of the extra pages in the CSX/C&O petition consists of pertinent portions of the lengthy arbitration record, which is helpful to our review.

BRC challenges our jurisdiction to decide the CSX/C&O petition. It contends, *inter alia*, that CSX/C&O's August 29, 1986, notice to BRCof the proposed repair shop transfer was inadequate under the requirements of the labor protective conditions imposed earlier in this proceeding. BRC requests dismissal of the CSX/C&O petition or, alternatively, oral hearing on the notice issue based on new evidence that BRC obtained after the arbitration hearing.

BRC's request is denied. The arbitration committee considered the notice issue, and, in a letter to the parties dated March 23, 1987, Arbitrator LaRocca denied BRC's motion to reopen based on the same evidence. Consistent with the substantial deference we will accord arbitrators on fact-bound issues, we will not reweigh the evidence here. Even if this issue involves interpreting our labor protective conditions, as BRC contends, we are satisfied that the interpretation was not improper.

Finally, BRC further challenges our jurisdiction by arguing that Federal district courts have exclusive jurisdiction to review arbitration decisions under 49 U.S.C. 11706(a) and that we may review the considered arbitration decision only by court referral. However, this argument was recently rejected in *United Transp.*

Union v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988) (*UTU* v. *N&W*), where the District of Columbia Circuit Court of Appeals affirmed the dismissal of a railroad union's appeal of an arbitration award issued under Commission-imposed labor protective conditions. The Court of Appeals found that such an award is an order of the Commission, which, if final, is reviewable only by the Court of Appeals and, if not final, is not ripe for judicial review. We made similar findings in *Lace Curtain* and described our scope of review for arbitration decisions. We found that arbitration decisions are not final as to issues within our described scope of review. *Lace Curtain, supra*. We affirm those findings and reject BRC's contentions.

BACKGROUND

In *Seaboard Air Line R. Co. - Merger - Atlantic Coast Line*, 320 I.C.C. 122 (1963) (*SAL - Merger - ACL*), we approved the consolidation of Seaboard Air Line Railroad Company (SAL) and Atlantic Coast Line Railroad Company (ACL), which later became SCL. The approval was subject to the labor protective conditions set forth in *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271 (1952), as modified in *Southern Ry. Co. - Control Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), 317 I.C.C. 729 (1963), and 320 I.C.C. 377 (1964) (*New Orleans*). Following our approval, and pursuant to the provision in former section 5(2)(f), now section 11347, permitting labor protection to be determined by agreement between rail carriers and employee representatives, SAL and ACL entered into the Orange Book agreement with BRC and 16 other unions. Under section 2 of the Orange Book agreement, all SAL and ACL employees were to be hired by SCL and receive so-called "attrition" labor protections. Under these protections, the employees would not be placed in a worse position with respect to compensation, rules, working conditions, fringe benefits, or related rights or privileges for their working lives. In exchange for these protections, SCL was entitled, under section 3(a) of the Orange Book agreement, to transfer the work of employees throughout the consolidated SCL system, and the parties were to enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection was provided.

In *CSX-Control, supra*, we approved CSX Corporation's application to control two non-carrier holding companies, the Chessie System, Inc., and Seaboard Coast Line Industries, Inc. (SCLI). Chessie controlled two major railroads, C&O and the Baltimore and Ohio Railroad (B&O), and SCLI controlled SCL. The railroad subsidiaries remained separate entities.[3] *Id.* at 575. The approval was subject to the so-called *New York Dock* labor protective conditions [*New York Dock Ry. - Control - Brooklyn East Dist.*, 60 I.C.C. 60 (1979)].[4]

On August 29, 1986, CSX/C&O issued written notice to BRC of their intent to close CSX's Waycross car repair facility and simultaneously to transfer the functions of that facility to the C&O's Raceland freight car heavy repair shop. The notice stated that work moved from Waycross would be ". . . coordinated with such work presently being performed at Raceland under the C&O Agreement." Approximately 50 percent of the employees currently occupying positions at the Waycross repair shop would be covered by the Orange Book Agreement.

In their notice, CSX/C&O informed BRC of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. BRC represents 121 of the incumbents holding positions slated for abolition. By class, the BRC incumbents are 99 carmen, 4 carmen helpers, 13 painters, and 5 painter helpers. With regard to these classes, CSX/C&O estimated that it would create positions for 96 carmen, 3 carmen helpers, 6 painters, and 4 painter helpers to perform the work transferred to Raceland from Waycross. As to other classes of incumbents at Waycross, CSX/C&O indicated that they would abolish 3 clerical positions, 11 blacksmith positions, 6 laborer positions, 3 machinist

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[3] On December 29, 1982, SCL merged with the Louisville and Nashville Railroad Company to form the Seaboard System Railroad, Inc. (SSR). On July 1, 1986, SSR changed its name to CSX Transportation, Inc. (CSXT). Subsequently, B&O was merged into C&O, which in turn was merged into CSXT on August 31, 1987. *See* Finance Docket No. 31106, *Chesapeake & Ohio Ry. and CSX Transp., Inc. Merger Ex.* (not printed), served September 18, 1987.

[4] *New Orleans* and *New York Doc* provide similar protections for affected employees and similar dispute resolution remedies, including arbitration.

positions, 4 sheet metal worker positions and 1 electric crane operator position. At Raceland, the carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions. CSX/C&O estimate that, under the arbitration committee's decision prohibiting the transfer of employees subject to the Orange Book Agreement, it could not require 57 Waycross carmen to transfer to Raceland.

After CSX/C&O served the August 29, 1986, notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful, primarily because of disagreements over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a *New York Dock* implementing agreement, and CSX/C&O's right to implement the transaction without first complying with the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). Thereafter, BRC and later CSX/C&O invoked arbitration in accordance with Article 1, section 4(a) of the *New York Dock* conditions and section 4 of the Orange Book agreement.

The arbitration committee found that the repair shop transfer is a transaction subject to the *New York Dock* conditions imposed in *CSX-Control* because the transfer is an action taken pursuant to our control authorization within the meaning of Article I, section 1(a) of *New York Dock*. *See BRC* v. *CSX, supra* at 29-30. The committee derived its authority to impose an implementing agreement for the repair shop transfer under section 4(a) of *New York Dock*, which requires that "any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4." *Id.* at 30. The committee recognized that, because it derived its authority from the *New York Dock* conditions we imposed in *CSX-Control*, it was a quasi-judicial extension of the Commission and therefore bound to follow our pertinent interpretations of the Interstate Commerce Act. *Id.* at 31. The committee then considered the Commission's views on the conflict between (1) the requirement in Article 1, sections 2 and 3, of the *New York Dock* conditions that rights under existing collective bargaining agreements be preserved; and (2) the authority of an arbitrator under Article 1, section 4, of *New York Dock* to authorize reassignment of employees in order to carry out the approved

transaction. The committee found the Commission's view to be that the arbitrator could override provisions in collective bargaining agreements if they conflict with implementation of the transaction. *Id.* at 33. The committee also considered the conflict between the Railway Labor Act's (RLA) extended dispute resolution mechanism for altering agreements and the final and binding effect of arbitration under section 4 of *New York Dock* permitting prompt changes in working conditions. The committee found that RLA procedures were overridden by the *New York Dock* procedures. It relied on expressions of the Commission's views in decided precedent and in Commission pleadings, as well as the exemptive effect of section 11341(a). Accordingly, despite a perceived conflict between the Orange Book agreement and the carrier's proposal, the committee found that it had "jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." *Id.* at 34. This statement that it had the authority to override existing agreements by requiring the work and employees to be moved summed up the committee's view of Commission policy on this issue. It also acknowledged our decisions holding that, under the immunity provisions of 49 U.S.C. 11341(a), implementation of transactions that we authorize under 49 U.S.C. 11343, such as *CSX-Control*, supersede employee protections under the RLA and collective bargaining agreements that conflict with those transactions.[5] *See* Finance Docket No. 30,000 (Sub-No.18), *Denver and Rio Grande Western Railroad Company - Trackage Rights - Missouri Pacific Railroad Company Between Pueblo, CO and Kansas City, MO, et al.* (not printed), served October

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[5] Section 11341(a), as pertinent, reads as follows:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other laws, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. * * * *

25, 1983, *(DRGW), rev'd sub. nom. Brotherhood of Loc. Engineers v. ICC,* 761 F.2d 714 (D.C. Cir - 1985), *rev'd on other grounds,* ___ U.S. ___ (June 8, 1987); and Finance Docket No. 30532, *Maine Central R.R. Co. Georgia Pacific Corp., Canadian Pacific, Ltd. and Springfield Terminal Ry. Co. - Exemption from 49 U.S.C. 11342 and 11343* (not printed), served September 13, 1985 *(Maine Central), aff'd mem. sub nom. Railway Labor Execs. Ass'n.* v. *ICC,* No. 85-1636 (D.C. Cir. Mar. 16, 1987).

The arbitration committee nevertheless held that the repair shop transfer should "reasonably accommodate" existing collective bargaining agreements and collective bargaining rights as well as existing merger protection agreements. *BRC* v. *CSX, supra,* at 33-34. The committee interpreted section 3(a) of the Orange Book agreement as barring CSX/C&O from transferring Orange Book protected *employees* or their *work* beyond former SCL property. It reasoned that the merging carriers could have foreseen that SCL might later become part of an even larger system. Thus, the drafters of the Orange Book could have easily written terms permitting unrestricted transfers across any enlarged system. *Id.* at 35-36. The committee recognized, however, that under *DRGW,* the Orange Book limitation on the transfer of work must be subordinated to CSX/C&O's right to engage in the authorized *New York Dock* transfer transaction. Otherwise the carriers would be effectively prevented from implementing the repair shop transfer. *Id.* at 36-37. Despite this, however, the committee refused to relieve CSX/C&O from the restriction against transferring Orange Book protected employees beyond SCL property. The Committee found that this limitation would only "slightly impair" the transaction while preserving the essence of the Orange Book Agreement as required under sections

2 and 3 of the *New York Dock* conditions.[6]

CSX/C&O contend that the arbitration committee's Orange Book employee exception may not stand because it conflicts with proper implementation of the repair shop transfer and our consolidation authorization in *CSX-Control.* They also argue that the Orange Book exception is based on a misinterpretation of the Orange Book agreement.

BRC contends that the repair shop transfer is not a transaction contemplated in *CSX Control* and, thus, not authorized under section 11343. Consequently, BRC contends that the arbitration committee exceeded its authority by allowing CSX/C&O to transfer the repair shop work at Waycross to Raceland beyond the SCL system, thus unilaterally abrogating the Orange Book agreement. BRC also argues that, even if the transaction were authorized by *CSX Control,* the committee impermissibly overrode sections 2 and 3 of *New York Dock* which require the preservation of collective bargaining agreements such as the Orange Book.

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[6] *New York Dock* sections 2 and 3 read as follows:

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided,* that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective condition or arrangement, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further,* that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

DISCUSSION AND CONCLUSIONS

The starting point in our review of an arbitration decision is the appropriate standard of review to be applied by us. *See* discussion of these standards in *Lace Curtain,* 3 I.C.C.2d at 735-36, and our recent decision in F.D. No. 28490 (Sub-No. 1), *Atlantic Richfield Company and Anaconda Company - Control - Butte, Anaconda & Pacific Railroad Company* (not printed), served March 2, 1988 *(ARCA)*, slip op. 6-7. A principal reason for starting with the standard of review is that much of our task can be ended there as well. As we indicated in *Lace Curtain,* 3 I.C.C.2d at 735-36, we do not propose to devote significant Commission time or resources to the review of an arbitrator's decision. We will employ an extremely limited standard of review, according substantial deference to the arbitrator's competence and special role in resolving labor disputes and giving a strong presumption of finality to an award. Our deference to the arbitrator's decision will vary with the nature of the issue involved, ranging from the most deferential treatment in the case of evidentiary issues such as causation, *Lace Curtain,* 3 I.C.C.2d at 736, *ARCA* at 9, to significantly less deference when reviewing interpretations of Commissions regulations or orders and matters of transportation policy. *Id.*

Applying these standards to this case, we accord substantial deference to the arbitration committee's causual determination that the Waycross-Raceland transfer is a transaction authorized by the Commission's approval in *CSX-Control. BRC* v. *CSX* at 33. *Cf. ARCA* at 8-10. The Committee applied the proper standards in arriving at the determination, *BRC* v. *CSX* at 29-33, and we decline to re-examine it. Accordingly, the arbitration committee also properly determined that the *New York Dock* conditions imposed by us in *CSX-Control* are applicable to employee dislocations caused by the Waycross-Raceland transfer.

Having found that the *New York Dock* conditions apply, the next major task for the committee was to explore the relationship between the absolute authority given the committee by section 4 of those conditions to effect changes in work and employee assignments through the implementing agreement, on the one hand, and, on the other, the preservation of collective bargaining agreements and rights (including Orange Book

rights) under sections 2 and 3 of those conditions and the dispute resolution procedures under the Railway Labor Act. The committee recognized that its views on this issue, a significant question of interpretation of a Commission order and policy, were entitled to no deference upon review by this Commission. This is evident when it stated (p. 31), "as a quasi-judicial extension of the ICC, this committee must strictly follow the ICC's interpretation of its own authority." As we have described above (p.4), the committee found that it was empowered to override collective bargaining rights, such as those in the Orange Book, and RLA rights in formulating the implementing agreement. Believing it was reflecting the Commission's views, the committee concluded it had the authority to move both work and employees to Raceland, despite potentially conflicting provisions in the RLA and the *New York Dock* conditions themselves ("the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation," award at 34). This is a correct statement of our position and we affirm the committee's finding on its authority.

The committee went on, however, to contradict its own statements and imposed a significant, if not insurmountable, obstacle to implementation of the transfer by prohibiting the reassignment of SCL employees to Raceland. This decision of the committee rests on an interpretation of the Commission's conditions and is a matter of Commission policy. As such, it is not entitled to deference. We find its ruling on this issue to be "egregious error," *Lace Curtain,* 3 I.C.C.2d at 735, and accordingly reverse the committee and remand the proceeding to them for further proceedings in accordance with this decision. While finding that the Orange Book provision on transfer of work "must be subordinated to the Carrier's right" to carry out the authorized transaction (pp. 36-37), the committee inconsistently, we believe, failed to give the same effect to the limitation on transfer of workers contained in the same provision. On its own, the committee fashioned a standard of "slight impairment of the transaction" (p. 37) for permitting a provision of a collective bargaining agreement to conflict with the implementation of an approved transaction, contradicting the ICC standard given by the committee at p. 34. The standard applied by the committee would effectively undercut the Commission's authorization of the

transaction here. As we will discuss below, we cannot affirm the committee on this issue.

As we indicated, even if the committee did properly interpret the Orange Book as prohibiting the transfer of employees outside former SCL limits, its attempted "accommodation" of this supposed prohibition to the proposed transaction must be overturned because the Orange Book agreement as interpreted by the committee serves as an impediment to implementation of a transaction authorized by the Commission. Once it is determined that a proposed transaction is authorized by the Commission (and we have affirmed the committee's finding that this transfer of repair work was authorized in *CSX-Control*), the carrier is permitted to carry out and fully implement the transaction despite potential impediments in existing agreements upon compliance with the provisions for the protection of the rights of employees contained in *New York Dock* or imposed by the Commission upon the involved transaction. As the committee found, and we agree, it has the authority to override these obstacles in the implementing agreement it will fashion. As a matter of Commission policy and as an interpretation of our conditions, we are constrained to overturn the decision to the extent it holds that CSX may not require transfer of SCL employees as well as work from Waycross to Raceland. Such transfers are of course subject to the terms set forth in *New York Dock* for the protection of the interests of affected employees.

In any event, the evidence does not support the committee's conclusion that a prohibition against transfer of Orange Book protected employees will only "slightly impair" the implementation of the repair shop transfer. The record shows that CSX/C&O is consolidating its heavy car repair operations at Raceland because of significantly reduced work and the need commensurately to reduce its repair operations to realize cost savings and operational efficiencies. The unrebutted evidence shows that CSX/C&O propose to establish a total of 107 positions at Raceland, including 86 carmen positions. Of the 86 Waycross carmen who are eligible for those positions, 57 are entitled to Orange Book protection. Under the arbitration committee's construction of the Orange Book, those 57 Waycross employees (over 55 percent of the proposed Raceland work force) can refuse

to accept positions at Raceland. In support of its refusal to supersede the construed Orange Book prohibition, the arbitration committee concluded (*BRC* v. *CSX*, at p. 37), that some of those employees could exercise seniority to remaining positions at Waycross. However, the carriers state that, after the transfer of work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority to fill. Imposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction. We need not speculate on precisely what amount of interference with implementation of an authorized transaction is permissible. The interference here is too great.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The opinion and award in *BRC* v. *CSX* is affirmed in part and reversed in part as described in this decision. It is remanded to the arbitration committee for further proceedings consistent with this decision.

2. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Lamboley dissented and will submit a separate expression at a later date.

Noreta R. McGee
Secretary

(SEAL)

COMMISSIONER LAMBOLEY, dissenting:

This is one in a series of three recent cases involving Commission review of arbitration awards.[1] In each case I find myself at odds with the majority's disposition.[2] I am concerned that we may becoming result-oriented in our review of awards, notwithstanding Commission standards applicable to the limited scope of deferential review.[3]

The present case involves an arbitration proceeding allegedly undertaken pursuant to the jurisdictional authority of the protective conditions imposed in the 1980 *CSX Corp. - Control - Chessie and Seaboard Co. L.I.* case.[4]

A close reading of the underlying *CSX-Control* case leaves substantial doubt whether there is any proximate nexus between the control transaction approved by the Commission and the transaction here at issue occurring some seven years later.[5]

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[1] See FD No. 29430 (Sub-No. 20), *Norfolk Southern Corp. - Control - Norfolk & Western Ry. Co. and Southern Ry. Co.*, (not printed), served June 10, 1988, (*NS-Arb*); FD No. 28583 (Sub-No. 24), *Burlington Northern, Inc. - Control & Merger - St. Louis - San Francisco Ry. Co.*, (not printed), served June 23, 1988. (*BN-Arb*)

[2] In *NS-Arb* the majority affirmed an award terminating employee RLA representation rights to effect a transfer, and in *BN-Arb*, the majority reversed and dismissed a proceeding concluding there was no jurisdiction for the award under previously imposed merger conditions.

[3] See *Chicago & Northern Western Trans. Co. - Abandonment* 3 I.C.C. 729 (1987) (aka *Lace Curtain*); FD No. 28490 (Sub-No. 1), *Atlantic Richfield Co. and Anaconda Co. - Control - Butte Anaconda & Pac. R.R. Co.*, (not printed), served March 2, 1988 (*ARCO/BAP*).

[4] 363 ICC 521 (1980) (*CSX Control*).

[5] Issues of proximate nexus and causation are discussed in *Southern Ry Co. - Control - Central Georgia Ry Co.*, 317 I.C.C. 729 (1963) aff'd *sub. nom. RLEA v. U.S.* 266 F. Supp. 521 (ED. VA. 1964) vac'd other grounds 379 U.S. 199 (1984), *Leavens v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977). See also recent arbitration review cases *ARCO/BAP, supra BN-Arb, supra* and *NS-Arb, supra*, (also my dissent in *NS-Arb*).

In my view, causation presents a substantial jurisdictional issue in this case.[6] I believe our remand does not include appropriate instructions to guide the panel on rehearing.

From the outset, the basic question whether the arbitration panel has requisite subject matter jurisdiction has been vigorously disputed by BRC. However, the panel in its award finds and concludes it has requisite jurisdiction based upon the parties *concurrence*.[7] Quite apart from considering whether jurisdiction can be obtained by stipulation, the panel's determination on that point is simply contrary to record fact.

The essence of the BRC argument, both before the arbitration panel and the Commission, is that while transfer of work may be a transaction that customarily falls within the scope of *NY Dock* conditions, subject matter jurisdiction depends on whether a particular transfer has a proximate or causal relationship to the underlying *control* transaction to which the conditions apply.[8] Thus, despite the fact that BRC generally "concurs" that a transfer transaction may be within *NY Dock* conditions, it contends this specific transaction is not because there is no proximate linkage to the transaction originally approved in the *control* case on which the conditions were imposed. Therefore, if the transfer is outside the scope of the approved transaction in *CSX-Control*, there is no requisite subject matter jurisdiction for these arbitration proceedings.[9]

A critical reading of the underlying *control* case casts serious doubt on a favorable finding of causation necessary to include this transfer transaction within the scope of the original transaction and its conditions. Nowhere in *CSX Control* was there

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[6] *Cf. BN-Arb, supra.* Our jurisdictional authority for review here is not at issue.

[7] *Award*, p. 29.

[8] See *BRC* Pre-Hearing Submission, Post-Hearing Submission, and Opinion of dissenting panel member to Award; Answer and Cross complaint for review.

[9] See *Southern Ry. Co., supra; BN-Arb supra*, also 49 U.S.C. §§11341(a), 11343.

any hint or suggestion that the Waycross-Raceland transfer was, immediately necessary, or in the future, could reasonably be anticipated as a subsequent event directly resulting from control. Indeed, the contrary would be a more ready conclusion.

In reviewing public benefits anticipated from various aspects of the control transaction, no mention is made of consolidation of heavy equipment repair at any location(s) within or between the systems to be controlled. The control transaction expressly contemplates control not merger, and continued operation of the individual railroads as separate corporate entities within each of the Chessie and SCLI rail systems. "Control" in the original transaction was little more than authority to coordinate the operations of two systems for purposes of achieving expanded "single system", but not "single line service."[10]

Anticipated impact on employees, in the control transaction was not regarded as significant. Dislocations were to be "short-lived" and expected to "occur within six months following final approval." Further, "perceptible" dislocations were possible "only at points where the basically end-to-end systems meet" to mesh for coordination of operations and which points were "clearly identified.".[11]

Interestingly, the Raceland facility is specifically mentioned, but only with reference limited to the creation of additional, new jobs resulting from increased production of railcars at that facility, not transfer of repair work.[12]

As a matter of procedure, the failure to include transfer of work to the Tampa facility to the company's NOTICE while possible error, in the circumstances of this case cannot be considered prejudicial. BRC had fair opportunity to address the issue. However, the panel's failure to include Tampa and consider the Waycross-Raceland-Tampa relationship may have arguably impacted a residual number of employees at Waycross without

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[10] *CSX Control supra*, pp 533, 553-556, 575-576.

[11] Id., at pp. 588-589.

[12] Id., at pp. 588-589, 641.

apparent work to perform, at a time when the company reasonably anticipated transferring to Tampa, work previously planned for Waycross in 1987.[13]

Finally, the majority attempts to establish the proposition that *any* conflict, regardless of origin or degree, is an impediment pre-empted by ICA provisions.[14] In my view, this represents a continuing effort to modify Commission precedent and runs contrary to existing judicial precedent.

Such precedent finds that Section 11341(a) is not absolute in its terms or in its operation; nor is it necessary that it be so in order to effect approved transactions. In a voluntary merger proceeding, the Supreme Court has held that once conditions requisite for approval have been satisfied, the Commission-approved transaction is self-executing, and further found that:

> "the parties are relieved of 'restraints limitations and prohibitions of law, Federal, State, or municipal' *insofar as may be necessary to enable them to carry into effect the transaction so approved.*" (emphasis added)[15]

The Court has also found that a "to the extent necessary" determination for exemption purposes does not require the Commission to contemplate unforeseeable legal obstacles or enumerate every legal obstacle that is waived.[16]

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[13] See *Award*, Carrier Members Reply to Dissent.

[14] 49 U.S.C. §11341(a).

[15] *Schwabacher v. U.S.* 334 U.S. 182 (1948) (construing Section 5(11), predecessor to Section 11341).

[16] See *County of Marin v. United States*, 356 U.S. 412 (1958).

Courts of Appeal reviewing Commission decisions have likewise required a "to the extent necessary" showing for pre-emption purposes.[17]

For its part, the Commission has historically taken the position that it will limit its review of issues involving application and interpretation of merger conditions. Moreover, in discussing this role, the Commission has clearly emphasized the beneficial purpose of protective conditions and the positive contribution found in accommodating the policies of the ICA and the RLA.

In *Leavens v. Burlington Northern*,[18] concluding its scope of review should be limited, the Commission held:

> "Our review should be limited to those matters that either result from the merger or which claim violation of a specific merger-related harm." Obviously, we would review such allegations only to determine whether or not the carrier has failed to implement the protections we recognized for adversely affected employees."[19]

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[17] See *Texas & New Orleans R. Co. v. Bhd. of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962) *cert. den.* 952 U.S. 934 (1963), *City of Palestine, Texas v. U.S.*, 559 F.2d 408 (5th Cir. 1977) *cert. den.* 435 U.S. 950 (1978). Also, FD No. 30000 (Sub-No. 18), *Denver & Rio Grande Western R. R. Co. - Trackage Rights Between Pueblo Co. and Kansas City, MO. (DRGW)* (not printed) (served October 19, 1983; *rev'd, sub. nom., BLE v. I.C.C.*, 761 F.2d 714 (D. C. Cir. 1985) rev'd on other grounds ___ U.S. ___ (June 8, 1987) Cf. *BLE v. CNW*, 314 F.2d 424 (8th Cir. 1962), *cert. den.* 375 U.S. 819 (1963).

[18] *Leavens, et al. v. Burlington Northern, Inc.* 348 I.C.C. 962 (1977).

[19] Id. at p. 975. This limited role was recently reaffirmed in FD No. 40074, *UTU v. Burlington Northern R. Co. and Houston Belt & Terminal Ry Co.* (not printed), served March 30, 1987). (The Commission stating: "It is clear that we have jurisdiction over those labor matters which stem from the conditions we adopted at the time the merger was authorized.") See also, FD No. 21478 (Sub-No. 7), *Great Northern Pac. & Burlington Lines, Inc. - Merger - Great Northern Ry, (Arco)* (not printed), served March 16, 1987). But see: FD No. 21478 (Sub-No. 6), *Great Northern Pac. & Burlington Lines, Inc. - Merger - Great Northern Ry, (Landis)* (not printed), served December 11, 1986.

Commenting on the special relationship between protective conditions, collective bargaining, and arbitration, the Commission observed:

> "However, in dealing with these protective conditions, the Commission is faced with a special problem - defining the extent of our ongoing responsibility to consider alleged breaches of the protective conditions for which an arbitration remedy is provided. In adopting these protective conditions and the related arbitration provisions, we provided that those who were most familiar with the complexities of labor law and the peculiar problems associated with railroad employees would determine disputes arising out of such conditions. This Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations."[20]

Emphasizing the need to accommodate the respective policies of the ICA and RLA, the Commission stated:

> "Our responsibility to impose protective conditions in a merger was not meant to give the Commission a right to interfere in the normal give and take of collective bargaining.
>
> "'The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated one to the other.' (citation omitted).
>
> We feel that in making the accommodation this Commission should undertake to enforce these protective conditions only to the extent stated above, i.e., to the extent that affected employees have suffered harm in violation of the adopted conditions as a result

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[20] Ibid.

> of the transaction or to the extent that a specific condition intended to protect against a specific harm that would result from the merger."[21]

More recently, the Commission has stated:

> "As UTU notes standard labor protective conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our revision authorizing the involved transaction and the underlying statutory scheme. *To the extent* that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give to the implementation of the transaction." (emphasis added.)[22]

In my view, the majority decision here seeks to enhance the dicta of *Maine Central*[23], further narrow the qualifying language of *DRGW* and ignore judicial precedent in pursuit of what I fear may be a goal to pre-empt application of all other laws, and at the same time, consistently deny the consideration of protections and remedies those laws provide. I continue to subscribe to the view that definition and accommodation of conflict, where possible, are more appropriate in dispute resolution proceedings.[24] To that end, I am inclined to accord substantial deference to labor arbitration proceedings.

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[21] *Id.* at p. 976.

[22] *DRGW, supra* also *NS-Arb, supra*. Earlier, the Commission had observed that it may nullify only those restraints that are "materially related" to a proposed merger or consolidation. See *Missouri Pac. R. Co. - Merger*, 354 I.C.C. 763 (1978) (commenting on *City of Palestine* decision.

[23] FD No. 30532, *Maine Central R. Co., et al. - Exemption from 49 U.S.C. §§1342 and 11343* (not printed), served September 13, 1985 *aff'd mem., sub. nom. RLEA v. I.C.C.*, 812 F.2d 1443 (D.C. Cir. 1987).

[24] See my separate expessions *NS-Arb supra, BN-Arb supra* and FD No. 30853, *Rowlett v. Missouri Pacific R. Co.*, (not printed), served August 19, 1987.

ARBITRATION COMMITTEE

In the Matter of the Arbitration Between:

BROTHERHOOD RAILWAY CARMEN - A DIVISION OF BRAC,

Organization,

and

CSX TRANSPORTATION, INC. and THE CHESAPEAKE and OHIO RAILWAY COMPANY,

Carriers.

OPINION AND AWARD

Pursuant to Article I, Section 4 of the New York Dock Conditions and Section 4 of the November 3, 1966 Merger Protective Agreement

I.C.C. Finance Docket No. 28905

Hearing Date: December 18, 1986
Hearing Location: Jacksonville, Florida

MEMBERS OF THE COMMITTEE

Employees' Member: R. P. Wojtowicz
Carriers' Member: J. T. Williams
Neutral Member: John B. LaRocco

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OPINION OF THE COMMITTEE

I. INTRODUCTION

On September 23, 1980, the Interstate Commerce Commission (ICC) approved CSX Corporation's petition to control two non-carrier holding companies: Chessie System, Inc. and Seaboard Coast Line Industries, Inc. ICC Finance Docket No. 28905 (Sub-No. 1). 363 I.C.C. 521 (1980). The Chesapeake and Ohio Railway Company (C&O) and the Baltimore and Ohio Railroad Company (B&O) are the major railroad subsidiaries of Chessie System, Inc. In 1980, Seaboard Coast Line Industries, Inc. was the parent of the Family Lines which included the Seaboard Coast Line Railroad (SCL). The successor enterprises of the Family Lines were Seaboard System Railroad and currently CSX Transportation, Inc. (CSX). The end to end consolidation produced a large single system serving the northeast, southeast and midwest. *Id.* at 553. The railroad subsidiaries remained separate entities. *Id.* at 575. To compensate and protect employees adversely affected by the control case and related proceedings, the ICC imposed the employee merger protection conditions set forth in *New York Dock Railway - Control - Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1979); affirmed, *New York Dock Railway v. United States*, 609 F.2d 83 (2nd Cir. 1979) ("New York Dock Conditions") on all of the involved railroads pursuant to the relevant enabling statute. 49 U.S.C. 11343, 11347; 363 I.C.C. 521, 588.

In 1966, the ICC approved the merger of the Seaboard Air Line Railroad Company (SAL) and the Atlantic Coast Line Railroad Company (ACL). The merged carrier became the SCL.

On November 3, 1966, the Brotherhood Railway Carmen (BRC) and sixteen other rail labor organizations entered into an Agreement with the SAL and ACL for the Protection of Employees in the Event of the SAL-ACL Merger. The Agreement, commonly referred to as the

Orange Book, was effective August 1, 1966. The parties negotiated the Orange Book pursuant to the last sentence of Section 5(2)(f) of the Interstate Commerce Act. In 1978, Congress enacted 49 U.S.C. 11347 and repealed Section 5(2)(f).

II. BACKGROUND AND SUMMARY OF THE FACTS

CSX and C&O (collectively "the Carriers") issued written notice, dated August 29, 1986, of their intent to close CSX's freight car heavy repair shop at Waycross, Georgia and to simultaneously transfer " . . . freight car heavy repair work and certain storeroom work at Waycross . . . " to the C&O's Raceland, Kentucky freight car heavy repair facility. The work moved from Waycros would be " . . . coordinated with such work presently being performed at Raceland under the C&O Agreement." The repair work and Waycross employees are presently subject to the SCL Schedule Agreement. Approximately fifty percent of the employees currently occupying positions at the Waycross repair shop are present employees within the definition set forth in Orange Book Section 2(a).

In their notice, the Carriers informed the Organization of their intent to abolish 149 positions at Waycross and establish 107 positions at Raceland. The Organization represents 121 of the incumbents holding positions slated for abolition. By class, the incumbents are 99 Carmen, 4 Carman Helpers, 13 Painters and 5 Painter Helpers. At the coordinated Raceland facility, the Carriers estimated that they would create 86 Carmen, 3 Carman Helper, 6 Painter and 4 Painter Helper positions to perform the work transferred from Waycross. Except as described above, the notice was silent concerning the 22 workers whose positions would be abolished but would be unable to either obtain an equivalent, newly established Raceland position or exercise their seniority to claim a remaining position at Waycross. The Carriers anticipated that they would close

the Waycross freight car heavy repair shop on or about December 31, 1986.

The notice also indicated that CSX would abolish 3 clerical positions, 11 jobs in the blacksmith's craft, 6 laborer positions, 3 Machinist positions, 4 jobs held by sheet metal workers and 1 electric crane operator position. At Raceland, the Carriers intended to establish only 1 clerical, 4 blacksmith and 3 laborer positions.

After the Carriers served the August 29, 1986 notice, the parties conferred at least twice to negotiate an implementing agreement. Their bargaining efforts were unsuccessful primarily because irreconcilable disagreements developed over the application of certain Orange Book provisions, the interrelationship between the Orange Book and a New York Dock implementing agreement and the Carriers' right to implement the transaction without first complying with the Railway Labor Act. 45 U.S.C. 151 *et seq*. Thereafter, the Organization, and later the Carriers, invoked arbitration in accord with Section 4(a) of the New York Dock Conditions.[1] Even though Section 4 contemplates arbitration by a single, neutral arbiter, the parties formed this Committee to resolve all outstanding disputes under the New York Dock Conditions and the Orange Book. Thus, we derive dual authority from Section 4 of the New York Dock Conditions and Section 4 of the Orange Book.

Beginning on November 4, 1986, the Organization challenged the jurisdiction of this Committee to fashion an implementing agreement. Despite its prior invocation of arbitration, the Organization may nonetheless contest our fundamental power to adjudicate this dispute. A lack of jurisdiction allegation may be raised at any time.

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[1] All sections pertinent to this case are found in Article I of the New York Dock Conditions. Thus, the Committee will only cite the particular section number.

Therefore, the Organization is not estopped from urging this Committee to dismiss all the substantive matters which the parties previously agreed to submit to us.

The Organization and the Carriers filed prehearing submissions and extensively argued their respective contentions at the December 18, 1986 hearing. Also, they filed post-hearing briefs which the Neutral Member received on January 2, 1987. This decision was issued within the thirty day limitation period found in Section 4(a)(3) of the New York Dock Conditions.

III. STATEMENT OF THE ISSUES

The Carriers pose the following question to this Committee:

> "Shall the terms of the attached agreement, proposed by the Carriers, apply to the implementation of the Carriers' August 29, 1986 notice to transfer all freight car heavy repair work from Waycross, Georgia to Raceland, Kentucky and to coordinate such work with that presently being performed at Raceland under the C&O Agreement?"

The "attached agreement" referred to in the Carriers' question at issue is a proposed implementing agreement which it sent to the Organization on October 15, 1986. The Carriers withdrew all their prior proposals.

In its opening submission, the Organization proffered four issues which read:

> "ISSUE NO. 1:
>
> "Is the CSX's notice dated August 29, 1986 (attached as Exhibit No. 1), concerning transfer of freight car heavy repair work from Waycross, Ga. on the SCL to Raceland, Ky. on the C&O adequate and specific enough notice under the *New York Dock* conditions?
>
> "ISSUE NO. 2:
>
> "If this arbitrator has jurisdiction of this dispute, can the affected employees who have lifetime

guaranteed jobs on the SSR under the Orange Book agreement–which gives the SSR the right to transfer work and employees only from their home point to other points on the former SAL-ACL railroads–be compelled to transfer to another point on another railroad which is not on the property of the former SCL and ACL railroads without unilaterally effecting a change in their wages, rules or working conditions as set forth in the Orange Book?

"ISSUE NO. 3:

"Can CSX move the work which is subject to the SCL (SSR) Working Agreement and restricted to the SCL employees, out from under the SCL agreement and place it under another contract (Working Agreement) on another railroad?

"ISSUE NO. 4:

"If the above issues each are answered in the affirmative, what should be the terms of an implementing agreement under Article I, Section 4 of *New York Dock*?"

In addition, the Organization's General Chairman on the C&O raised another issue although the question is actually a subset of the above stated fourth issue. The C&O General Chairman presented the following question:

"Shall the C&O employees, junior in seniority to employees transferring from Waycross, Georgia, corresponding [sic] to the number of senior employees transferring to the coordinated operations, be subject to the protective benefits set forth in Article 5 and 6 of the New York Dock Conditions?"

IV. RELEVANT STATUTES, ORANGE BOOK PROVISIONS, EXCERPTS FROM NEW YORK DOCK CONDITIONS AND RECENT COURT DECISIONS

To fully understand the parties' contentions, we must first relate the relevant statutes, contract provisions and legal authority.

The ICC promulgated and imposed the New York Dock Conditions pursuant to the Congressional mandate in Section 11347 of the Interstate Commerce Act. 49 U.S.C. 11347. Starting with Section 1(a), a transaction is "... any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." Section 4(a) states that "... any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or [arbitrator's] decision under this section 4." [Brackets added for clarification.] 360 I.C.C. 85. Assuming we have jurisdiction, Section 4 empowers this Committee to write an implementing agreement providing for "... the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case ... " *Id.* Also, Section 4 requires the Carriers contemplating a transaction to issue a notice containing "... a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." With regard to its jurisdictional challenge, the Organization relies heavily on Sections 2 and 3 of the New York Dock Conditions. These two sections state:

"2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

"3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; *provided*, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective

conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; *provided further*, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, *provided further*, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement."

Section 3 (a) of the Orange Book reads:

"*In consideration of the foregoing employee benefits the Merged Company shall*, subject to compliance with the provisions of Appendix F attached hereto, *be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will*, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, *enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided* and the employees, their organizations and the Carriers will cooperate to that end." [Emphasis added.]

The pertinent portion of Section 11341 (a) of the Interstate Commerce Act provides that a carrier or person participating in an approved transaction " . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction . . . " 49 U.S.C. 11341(a). In *Denver and Rio Grande Western Railroad Co. - Trackage Rights - Missouri Pacific Railroad Co.*, Finance Docket No. 30000 (Sub-No. 18) (October 19, 1983) (unreported) ("the *DRGW* Case"), the ICC interpreted the

scope of its Congressionally delegated authority pursuant to Section 11341 (a). The Commission asserted: "Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the . . . " Railway Labor Act. *DRGW* at 5. The ICC observed that if its approval of a transaction " . . . did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring a change in working conditions of any employees would be substantially nullified." *DRGW* at 6. The ICC ruled that a duly approved trackage rights agreement containing crew assignments was paramount to conflicting terms in the schedule labor agreements.

The District of Columbia Circuit Court of Appeals reversed the ICC's decision. *Brotherhood of Locomotive Engineers v. Interstate Commerce Commission*, 761 F.2d 714 (D.C. Cir. 1985); cert. granted _ U.S. _ (1986). While recognizing that Congress granted the ICC broad powers to exempt transactions from legal obstacles, the Court ruled that the ICC must justify the exercise of its statutory authority. The case is currently pending before the United States Supreme Court.

V. THE POSITIONS OF THE PARTIES

A. The Organization's Position on Jurisdiction

The Organization strenuously argues that we lack jurisdiction to fashion an implementing agreement which changes the rules and working conditions in existing collective bargaining and job security agreements. Section 2 of the New York Dock Conditions bars the Carriers from utilizing the compulsory interest arbitration mechanism in Section 4 to remove either employees or work from the SCL Agreement and place the work or workers under the C&O agreement without exhausting the notice and collec-

tive bargaining requirements in the Railway Labor Act. 45 U.S.C. 151, 156. Neither the ICC nor a Section 4 arbitrator can bind the Organization absent its consent.

The Organization reviewed the history of employee protection in the railroad industry. The historical record evinces a consistently strong public policy favoring employee protection as the consequence of streamlining the national rail transportation network. The Organization emphasizes that the New York Dock Conditions, like all employee protective arrangements, are imposed on carriers for the sole benefit of their workers. If Section 4 of the New York Dock Conditions becomes a subterfuge for inflicting mandatory, binding interest arbitration on employees and their representatives contrary to Sections 6 and 7 of the Railway Labor Act, the employee protection is irrationally twisted into a formidable weapon for, instead of an obligation on, rail carriers. Railroads will routinely resort to Section 4 to unilaterally fix rates of pay, rules and working conditions. Needless to say, such a result compoletely undermines collective bargaining. Pursuant to express statutory provisions, interest arbitration in the railroads has always been voluntary. 45 U.S.C. 157, First. Arbitrators acting under the ICC's New York Dock Conditions lack the power to change or vitiate existing labor contracts.

Before and immediately after the formulation of the New York Dock Conditions, the ICC and arbitrators uniformly ruled that they lacked jurisdiction to alter the terms of collective bargaining agreements within the context of promulgating an implementing agreement to govern the effectuation of an ICC approved transaction. *NW/IT v. RYA/UTU*, NYD § 4 Arb. (Sickles, 1981); *NW/IT v. BLE/UTU*, NYD § 4 Arb. (Zumas, 1982); *NW/IT v. UTU*, NYD § 4 Arb. (Edwards, 1981); and *B&O v. BMWE*, NYD § 4 Arb. (Seidenberg, 1983). Any other outcome would render Section 2 of the New York Dock Conditions

meaningless. More particularly, the ICC never claimed authority to indefinitely supersede the Railway Labor Act far into the future merely because it, at one time, imposed employee protective conditions on a railroad. *Southern Railway Co. - Control - Central of Georgia Railway Co.*, 331 I.C.C. 151, 169-170 (1967); and *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). After the ICC's decision in the *DRGW* case, arbitrators overruled the prior line of decisions and held that they had authority to amend or nullify collective bargaining agreements and, in the extreme, to change representation. The issue is before the Supreme Court. At the specific request of the carrier-applicants in the *DRGW* case, the ICC expressly approved a trackage rights agreement containing crew assignment provisions at odds with existing collective bargaining agreements. In its brief to the Court, which is the ICC's latest pronouncement on its exemption authority, the ICC limited its claimed preemption over the Railway Labor Act. In footnote 17 on page 25 of its opening brief, the Commission wrote, "The Section 11341 (a) exemption applies, of course, to terms comprehended by the Commission's approval order." So, the ICC has now informed the Supreme Court that it seeks to supersede the Railway Labor Act only to the extent that it approved specific, future projects which the carrier-applicants presented to it during the course of the administrative proceeding. The transfer of work and workers from Waycross to Raceland was not placed before the ICC as part of the control application. On the contrary, the ICC, relying on the Carriers' representations, opined that the merger of the two holding companies would cause only short-lived employee displacements. 363 I.C.C. 521, 589. The ICC observed that, "It is anticipated that all changes in employee positions will occur within 6 months following final approval of the applications." *Id.* Again, the Carriers led the ICC to believe that "perceptible dislocations" will be necessary only "... at points where the ... end-to-end systems meet ... " Waycross is approximately 600 miles

from Raceland and almost 500 miles from the nearest C&O point. Without doubt, the ICC did not foresee the Carriers' misguided attempt to coordinate work at two distant shops on two separately operated rail subsidiaries. The Carriers conveniently ignore the differences between the merger of two holding companies and the full scale merger of the subsidiaries. Since the subsidiaries are separate companies, the Carriers may only effect their proposed coordination pursuant to the terms of the Washington Job Protection Agreement. Inasmuch as the Carriers did not present the instant coordination to the ICC, jurisdiction accrues to this Committee only after the Carriers fully comply with the Railway Labor Act.

Similarly, this Committee may not entertain any changes in the Orange Book inasmuch as that merger protective agreement vests covered employees with lifetime employment on the former SCL property. Section 3 of the New York Dock Conditions absolutely preserves workers' rights and benefits under existing protective agreements. The ICC has never even hinted that its approval of a transaction abrogates prior employee protective contracts especially when those agreements, like the Orange Book, were negotiated in conjunction with the ICC's imposition of employee protection as a condition precedent to consummating an earlier merger. Since the ICC has never ruled that its orders prevail over the types of contracts listed in Section 3 of the New York Dock conditions, the Carriers cannot use Section 4 to compel the BRC to surrender Orange Book benefits.

Finally, the Organization may, at its discretion, negotiate implementing agreements which modify existing agreements. The Carriers cannot force the Organization to change the existing collective bargaining agreements in this case merely because, a few times in the past, the Organization voluntarily reached implementing agreements with the Carriers.

Raising an alternative jurisdictional consideration, the Organization avers that the Carriers' August 29, 1986 correspondence failed to satisfy the Section 4 notice requirements for two reasons. First, the notice was vague as to both employees and work. The notice failed to describe exactly what freight car heavy repair work was going to Raceland. Although the Carriers were creating 22 fewer positions at Raceland than they were eliminating at Waycross, they did not give any indication as to the status of the 22 employees who would be detrimentally affected by the transaction. Second, BRC's C&O General Chairman was skeptical of the Carriers' estimated need for 99 Raceland positions to perform the work moved from Waycross. Furthermore, he was particularly wary of the Carriers' intent to bring more employees into Raceland inasmuch as the C&O furloughed more than 200 Raceland Carmen on November 28, 1986. An improper Section 4 notice deprives this Committee of jurisdiction and the case must be dismissed. The Carriers must initiate the Section 4 process *de novo*, by tendering a new notice which fully and adequately describes their proposed changes including an accurate estimate of workers needed to perform the transferred work.

B. The Carriers' Position on Jurisdiction

At the onset, the Carriers underscore the rational business purpose of the coordination. Shippers' demand for conventional type freight cars is diminishing. They are opting for privately owned cars or intermodal equipment. While Raceland Shop is plagued with excess capacity, the Waycross facility lacks the space to assume repair work from Raceland unless CSX expends enormous sums to expand and renovate the plant. Since both shops will not be needed in the future, the Carriers chose to close the Waycross repair facility and transfer the work to Raceland.

During oral argument, the Organization conceded that the planned Waycross-Raceland coordination was a trans-

action within the ambit of the New York Dock Conditions. Admittedly, the Carriers did not specifically present the instant coordination to the ICC but all parties as well as the ICC realized that the railroads might engage in transactions other than those alluded to in their initial operating scheme long after the ICC's omnibus approval of the control application. The Commission remarked that it is "... possible that as the two systems mesh their operations, additional coordinations may occur that could lead to further employee displacements." 363 I.C.C. 521, 589 (1980). In his affidavit, the General Counsel of the Brotherhood of Maintenance of Way Employees realized that approval would eventually permit extensive future changes not needing ICC approval. The Commission responded to labor's concerns by imposing the New York Dock Conditions on each and every transaction. As the ICC found, the "... conditions will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *Id.* Most importantly, the ICC concluded that the operation of a single system would permit the Carriers to reap operating and cost efficiencies including the alleviation of excess capacity at the C&O's Raceland facility. *Id.* at 538 and 561.

The Organization's position that this Committee lacks jurisdiction to formulate an implementing agreement covering the coordination of work between Waycross and Raceland is inconsistent with its past participation in consolidations which the Carriers undertook pursuant to the control case and in accord with arbitrated implementing agreements. See *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1984); *C&O v. BRC*, NYD § 4 Arb. (Marx, 1984); and *BRC v. B&O*, NYD § 4 Arb. (Fredenberger, 1983). Jurisdiction was not an issue in any of these three prior Section 4 arbitrations manifesting the Organization's recognition that the sole purpose of Section 4 is to procure an implementing agreement covering the transaction.

The jurisdictional issue presented to this Committee is not a question of first impression. Many respected neutrals have ruled that, under Section 4 of the New York Dock Conditions, an arbitrator has the power to issue an implementing agreement governing a work transfer even though the transaction had not been anticipated during the ICC proceedings and implementation would override terms of existing collective bargaining agreements. *UP v. ATDA*, NYD § 4 Arb. (Fredenberger, 1984); *UP v. UTU*, NYD § 4 Arb. (Brown, 1985); *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985); and *UTU v. NW/SR*, NYD § 4 Arb. (Ables, 1985). In *UP v. ATDA*, *supra* at 12, Arbitrator Fredenberger relied on the *DRGW* case and concluded that "... the ICC ... determined that the Railway Labor Act and existing collective bargaining agreements must give way to the extent that the transaction authorized by the Commission may be effectuated." When it approved the CSX control application, the ICC necessarily authorized the transfer of work from one carrier to another as the inevitable consequence of implementing a transaction. If the Organization prevails, it would achieve its objective of thwarting all transactions. Such an outcome effectively cancels the ICC's approval in the control case. The Carriers would be precluded from ever obtaining the savings and benefits of operating a single rail system. In the *DRGW* case at page 5, the ICC emphasized that its "... approval exempts a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption ... " from the Railway Labor Act. See also, *Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co.*, 314 F.2d 424 (8th Circ. 1963), cert. den., 375 U.S. 819 (1963). Continuing on the next page of its decision, the ICC squarely rejected the Organization's inference that its ruling conflicted with Section 2 of the New York Dock Conditions when it declared:

> "The terms of those conditions, however, must read in conjunction with our decision authorizing

> the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

The Organization employs wishful thinking when it asserts that the ICC subsequently modified its view of its own authority when the *DRGW* case reached the Supreme Court. The footnote which the Organization cites from the ICC's brief is attached to an unequivocal sentence reading: "The scope of the exemption is defined by the terms of the approved transaction." The ICC's brief provides little solace for the Organization. In its Reply Brief filed with the Court, the ICC vigorously asserted that provisions of the Railway Labor Act and collective bargaining contracts are automatically superseded to the extent necessary to carry out approved transactions. The ICC knew, as stated in its brief, that if the Carriers first had to endure the protracted negotiating procedures, with the right of economic self-help, contained in the Railway Labor Act, the transaction would be indefinitely delayed and most probably nullified. Thus, mandatory arbitration under Section 4 of the New York Dock Conditions insures that the parties will arrive, through either negotiation or arbitration, at an implementing agreement. Section 4 obviates the "... risk of non-consummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement these transactions ... " *Maine Central Railroad Co., Georgia Pacific Corporation, Canadian Pacific Ltd. and Springfield Terminal Railway Co. - Exemption From 49 U.S.C. 11342 and 11343*, I.C.C. Fin. Docket No. 30532 (August 22, 1985); appeal pending No. 85-1636 (D.C. Cir.).

All Carmen, who transfer from Waycross to Raceland, must be placed under the C&O Agreement to necessarily effectuate the coordination. And, the transaction cannot be consummated unless the Waycross freight car heavy repair work is shifted to the coordinated facility.

On December 30, 1980, the Organization entered into an implementing agreement providing for the transfer of SCL Carmen's work to the C&O. To reiterate, the Organization acknowledged that, as a consequence of accomplishing the transaction, Carmen may be removed from the SCL Agreement and placed under the C&O Agreement. In addition, the Carriers stress that they successfully negotiated implementing agreements covering this particular transaction with four of the six other labor unions representing affected Waycross employees. As to the two unions which have not signed implementing agreements, the unresolved issues are unrelated to the Carriers' right to transfer workers from Waycross to Raceland.

The Organization has the misplaced notion that the Carriers desire, through this Section 4 arbitration, to vitiate the Orange Book and schedule Agreements. After implementation, the SCL working Agreement and the Orange Book will remain viable and unaltered. Orange Book protected employees moving to Raceland will retain the full spectrum of benefits in the Orange Book.

In summary, this Committee has the jurisdiction to prepare an implementing agreement so that the Carriers may consolidate the work at Raceland. The exemption from the Railway Labor Act is coextensive with the ICC's approval in the control case.

With regard to the sufficiency of the Carriers' August 29, 1986 notice, the document disclosed exactly what changes were forthcoming and included an estimate of the number of employees, in each class, affected by the planned changes. The notice described the relevant Waycross work, noted the Waycross positions to be abolished

and the Raceland positions to be established, and informed the Organization of CSX's intent to close the Waycross facility. The plain, obvious fact was that the 22 employees (directly affected by the coordination) would be protected under the New York Dock Conditions. The notice contained sufficient details to permit the Organization to discuss the impending changes. None of the other labor organizations (which represent members affected by the transaction) challenged the adequacy of the notice. The Neutral Member of this Committee has previously ruled that the adequacy of Section 4 notices must be adjudged on a case by case basis. *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985). The notice in this case is even more specific and informative than the notice tendered in the above case and thus, it conformed to Section 4 of the New York Dock Conditions.

C. The Carriers' Position on the Contents of an Implementing Agreement

During negotiations, the Carriers offered the BRC more generous terms than the minimum level of benefits contained in the New York Dock Conditions. However, the Carriers' offer was conditioned on expeditiously consummating an agreement without resorting to arbitration. When negotiations reached impasse, the Carriers withdrew their offer and substituted the proposed October 15, 1986 implementing agreement. This Committee should disregard the Carriers' withdrawn proposals to encourage the Organization to reach negotiated settlements on future transactions. In addition, a Section 4 Arbitrator lacks the authority to write an implementing agreement which grants workers benefits greater than those specified in the New York Dock Conditions.

Immediately upon notification of the impending transaction, the Organization took the novel position that Orange Book protected workers could not be transferred to Raceland. Contrary to the Organization's bold assertion,

there is no language in the Orange Book prohibiting the Carriers from moving Orange Book protected employees to points beyond the boundaries of the former SCL property. Since 1966, none of the labor organizations which are parties to the Orange Book, including the BRC, have even suggested that the Carriers may only transfer Orange Book covered employees to other SCL locations. If any labor organization had taken such an untenable position, the issue would certainly have been adjudicated long ago. Orange Book Section 3(a) permitted the Carriers to transfer Orange Book employees throughout the former SCL system and concomitantly required the Organization to negotiate implementing agreements governing the force rearrangements. The Organization cannot, twenty years later, convert an affirmative right flowing to the SCL into a restriction on the Carriers' right to move Orange Book employees beyond the former SCL property.

By already signing implementing agreements, other labor organizations involved in this coordination recognize the Carriers' right to require Orange Book protected employees to transfer to Raceland with their work. Moreover, the current BRC General Chairman was not in office when the Orange Book was signed. His predecessor was privy to Orange Book negotiations. The former General Chairman implicitly acknowledged that Orange Book protected employees could be transferred to other than SCL points because he entered into implementing agreements providing for such transfers. The Seaboard System Railroad's former Executive President, who is also familiar with both negotiating and applying Orange Book provisions, confirmed that the parties never intended to grant Orange Book protected workers insulation from transfers to locations other than those on the former SCL property. The retired Executive Vice President further attested in Paragraph 12 of his December 8, 1986 affidavit:

> "12. From my familiarity with the negotiations leading to the agreement known as the Orange

> Book, there was a 'give and take' whereby certain working life income guarantees were granted by the merging railroads in exchange for the right of the merged carrier, SCL, to transfer work, consolidate facilities, and thereby transfer employees pursuant to implementing agreements to be negotiated thereunder."

The Orange Book was negotiated in an atmosphere replete with railroad mergers. The Orange Book drafters could easily foresee that there would be additional mergers necessitating SCL employees to relocate on the expanded property of a successor employer.

The parties have never accorded Orange Book covered employees the absolute right to remain on the SCL property. Pursuant to a December 30, 1980 implementing agreement, SCL Carmen, including Orange Book employees, transferred to the C&O. Six SCL Carmen, three of whom came under the Orange Book, shifted to the C&O and continued to enjoy Orange Book protection. In 1967, shortly after the Orange Book was signed, the Organization was a party to an implementing agreement providing for the transfer of SCL Carmen to the Richmond, Fredericksburg and Potomac Railroad. In 1973, the BRC along with other shop craft unions entered into an implementing agreement covering the coordination of SCL and Louisville & Nashville Railroad (L&N) shop facilities in Alabama. Other labor unions have also entered into implementing agreements requiring Orange Book protected workers to transfer off the SCL. Some Orange Book employees opted for a separation allowance per Orange Book Appendix G.

The Organization is again attempting to forever block the transaction by arguing that the transfer would place workers in a worse position, as specified in Orange Book Section 2(b), due to weather differences between Raceland ("harsh") and Waycross ("mild"). The contention is ludicrous. Greater weather variations can be expected vis-a-vis Miami, Florida and Richmond, Virginia yet, even the

Organization concedes that the Orange Book allows transfers between these two SCL points.

The Organization's proposed implementing agreement terms go far afield of the New York Dock Conditions and would render the transaction so expensive as to effectively prevent implementation. The Organization proposes that all Carmen may decline Raceland positions and, upon their voluntary furlough, still collect Orange Book benefits or New York Dock dismissal allowances. The Carrier would not only be burdened with paying expensive protection benefits but also would have to pay Raceland employees to perform Waycross work. The BRC General Chairman on the C&O seeks to automatically certify an unspecified number of Raceland employees even though dovetailing seniority does not constitute a *per se* adverse effect on junior Raceland Carmen. Whether or not any Raceland workers are eligible for New York Dock payments is best left to a Section 11 proceeding. In the control case, the ICC rejected labor's requests to prohibit residence changes and to enact a conclusive presumption as to adverse effect. 363 I.C.C. 589-590. Another Organization proposal might be inequitably construed to allow senior, furloughed Raceland Carmen to immediately displace junior workers who just followed their work from Raceland. Finally, the SCL General Chairman inappropriately urges utilization of furloughed Waycross Carmen ahead of Raceland employees. Not surprisingly, both the Carriers and the Organization's C&O General Chairman oppose this proposal.

On the other hand, the Carriers' proposed implementing agreement follows the New York Dock Conditions. Forced assignments at Raceland should be made in seniority order consistent with an employee's duty to exercise seniority over his work to the fullest extent. Once the transaction is implemented, there is no reason for the transferred workers to retain seniority at Waycross. The

Carriers request the Committee to adopt their October 15, 1986 proposed implementing agreement.

D. The Organization's Position on the Contents of an Implementing Agreement

The Orange Book clearly and unambiguously affords covered workers lifetime job protection on the SCL. The only exceptions are found in Orange Book Section 2(e). Section 3(a) permits work transfers on the ACL-SAL consolidated system but no further. Transferring Orange Book employees beyond the SCL property places them in a worse position with respect to their working conditions. See Orange Book Section 2(b). The intent and language of the Orange Book demonstrates that covered employees received guaranteed jobs on the former SCL property throughout their worklife. The Orange Book protection is shielded by Section 3 of the New York Dock Conditions and Orange Book protected employees have the right to elect Orange Book benefits as soon as they are affected by a New York Dock transaction. *SSR v. BRAC*, NYD § 4 Arb. (Zumas, 1983). Thus, they are entitled to opt for protective benefits and decline to transfer to Raceland.

The Carriers are unable to point to any Orange Book provision giving the Carriers the unilateral right to move Orange Book employees to the C&O property. On the contrary, Section 3(a) sets the limits of the Carriers' right. Moreover, the terminology regarding seniority in Section 2(e) refers to ". . . existing rules or agreements." Those rules, which are found in the agreements in effect at the time of the merger, provide for point seniority. For the same reasons, the classification of work rule in the January 1, 1968 schedule Agreement preserves the Waycross freight car heavy repair work to the Carmen's craft on the SCL. The Carriers' proposed implementing agreement would abrogate the Orange Book and the then existing working agreement.

At one time (in 1980), the Organization voluntarily entered into an implementing agreement allowing the Carriers to transfer SCL employees, including some Orange Book protected workers, from the SCL property at Richmond to a C&O facility in the same city. The Organization's voluntarism is not precedent for the wholesale removal of all Orange Book protected employees from the SCL. In contrast to the instant transaction, the Orange Book employees were not required to change their residence. The Carriers cannot compel the Organization to execute a similar implementing agreement under the guise of the New York Dock Conditions. The Organization's voluntary action was non-precedential. Although other labor organizations signed implementing agreements to govern this transaction, none (or at most one) of their members, who are involved in this transaction, enjoy Orange Book protection.

The Raceland weather is much more severe than at Waycross. Many of the Waycross Carmen work outdoors. Moving to a harsher working environment constitutes a change in working conditions which is prohibited by Section 2 of the New York Dock Conditions.

Besides provisions keeping Orange Book protected employees on the former SCL property and guaranteeing these workers an election of benefits at the time this transaction is effectuated, the implementing agreement should contain terms close to the implementing agreement originally proposed by the Carriers. The Carriers' October 15, 1986 proposal is grossly inferior to their prior offer. The Carriers are improperly penalizing the Organization for sincerely raising other issues, such as Orange Book interpretation, which directly impacted on the negotiations over an implementing agreement.

The BRC advocates the following changes to the Carriers' October 15, 1986 proposal. First, forced assignments to unfilled Raceland positions should be accomplished in

reverse seniority order. Since there will be fewer positions established at Raceland, it is more logical to start with junior affected employees allowing the senior workers, as opposed to junior workers, to remain in Waycross and draw protective benefits. Second, since the work being transferred to Waycross would have accrued to furloughed Waycross Carmen upon the retirement, resignation or death of active Waycross employees, the furloughed Waycross Carmen should have superior rights over Raceland employees to the transferred work. However, the BRC General Chairman on the C&O takes exception to this particular proposal. Third, workers who transfer should retain dual seniority at Raceland and Waycross. If a position (other than one of temporary duration) becomes vacant at Waycross, these workers will have a one time opportunity to return to Waycross and depending on their election, they will forfeit either their Raceland or Waycross seniority. Fourth, the Organization proposes the following language for inclusion in the implementing agreement:

> "When the transfers from Waycross to Raceland take place, a like number of the C&O employees at Raceland will be provided with *New York Dock* protective conditions starting with the oldest Raceland employee that falls below the youngest employee transferring in from Waycross; i.e., if 86 Waycross carmen are dovetailed into the Raceland seniority roster, then 86 Raceland carmen–starting with the oldest Raceland carmen in seniority–who falls below the youngest carmen in seniority from Waycross will be protected by the *New York Dock* protective conditions."

The C&O General Chairman asserted that Raceland has already absorbed several consolidations involving incoming workers over the last several years. While dovetailing is the fairest method of combining seniority rosters, each added coordination has detrimentally affected the relative seniority standing of Raceland Carmen. The constant influx of more senior workers cancels the benefits

derived from the accumulation of seniority. Subsequent to the transfer of work from Waycross, it becomes more likely that some presently employed Raceland Carmen will be furloughed. Protecting Raceland workers would give them more job security and compensate them for the loss of relative seniority. If the Carriers have correctly estimated that there will be sufficient work to occupy 99 additional Carmen, it should not object to protecting an equivalent number of Raceland Carmen because presumably the latter will continue in active employment.

VI. DISCUSSION

A. Jurisdiction

1. The Notice. The threshold issue before this Committee is whether the Carriers' August 29, 1986 notice conforms to the minimum requirements of Section 4 of the New York Dock Conditions. The pertinent portion of Section 4 provides: "Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes."

The Neutral Member of this Committee commented on the purpose and meaning of the above language in another Section 4 case, as follows:

> "The purpose of the advance notice is twofold: the notice triggers the Section 4 procedures which contain tight time deadlines for obtaining an implementing agreement; and, it informs the Organization (as well as all interested employees) of the impending, authorized New York Dock transaction so that the Organization and the Carriers may bargain, in good faith, over the terms of an implementing agreement. 360 I.C.C. 71. The notice must contain a full and adequate statement of the intended transaction and include an estimate of the number of affected workers. Since the ICC, in Article 1, Section 4(a) did not enumerate the essential elements of a New York Dock

> notice (aside from the adjectives "full and adequate" and the mandatory estimate), whether a particular notice conforms to Section 4(a) must be decided on a case by case basis." *C&O/L&N v. BRS*, NYD § 4 Arb. (LaRocco, 1985).

Thus, the propriety of a Section 4 notice must be evaluated on a case by case basis taking into account the surrounding circumstances and peculiarities of each New York Dock transaction.

In this case, the notice satisfied Section 4. Since the Carriers intend to close the Waycross facility, all freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work. Also, the Carriers, in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining. The notice adequately apprised the Organization of the nature or the impending transaction because it easily ascertained that, from its perspective, the transaction would vitiate employee rights in the Orange Book and the SCL working Agreement.

2. Subject Matter Jurisdiction. In Section 1(a) of the New York Dock Conditions, the ICC broadly defines a transaction as ". . . any action taken pursuant to authorizations of this Commission on which these provisions have been imposed." 360 I.C.C. 84. The parties concur that the transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction. It is also undisputed that the intended consolidation was not expressly and specifically presented to the Commission during administrative proceedings culminating in approval of the control application.

Where a transaction may cause the dismissal of displacement of workers, an implementing agreement:

> ". . . shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and *any assignment of employees made necessary by the transaction* shall be made on the basis of an agreement or decision under this section 4." [Emphasis added.] 360 I.C.C. 85.

While the ICC clearly authorized the Carriers to undertake transactions, it also plainly provided for the plenary preservation of all existing collective bargaining rights, collective bargaining agreements and employee protection agreements. (See Sections 2 and 3 of the New York Dock Conditions.) When the Carriers' authorized transaction embraces components which could arguably conflict with the terms of one or more existing agreements, the issue becomes to what extent, if any, a New York Dock implementing agreement may properly preempt the existing agreements and the Railway Labor Act. The issue is an ongoing controversy in rail labor relations and is currently before the United States Supreme Court. Thus, any principles we espouse on this matter should be reevaluated based on the Supreme Court's decision in the *DRGW* case.

To resolve the issue in this case, we start by attempting to balance the competing policies of the Railway Labor Act and the ICC's New York Dock Conditions on the one side and the Interstate Commerce Act on the other side. The New York Dock Conditions were imposed on railroads for the exclusive benefit of any employee affected by a transaction. However, the Conditions were imposed as part of the ICC's overall regulatory scheme which is designed to encourage merged rail carriers to augment their ability to compete in the transportation marketplace by consolidating operations. Transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining. Consolidations upset stable collective bargaining relationships. Thus, there is not just

tension between the Railway Labor Act and the Interstate Commerce Act but a classic clash of two important Federal statutes. Compare: *Texas and New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, *supra* at 158-160, with *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Co.*, *supra*. The conflict has been carried forward into the New York Dock Conditions.

As a quasi-judicial extension of the ICC, this Committee must strictly follow the ICC's interpretation of its own authority. In the *DRGW* case, the ICC decided that 49 U.S.C. 11341(a), the source of the exemption, granted the Commission expansive and self-executing authority to immunize an approved transaction from the Railway Labor Act and existing collective bargaining agreements to the extent the statute and terms of the agreements bar implementation of the transaction. According to the ICC, Section 11341(a) insulates a transaction from all legal obstacles preventing or impeding effectuation. Subsequent to the ICC's ruling in the *DRGW* case, arbitrators who promulgated New York Dock implementing agreements pursuant to Section 4, have universally decided that implementation of a transaction prevails over conflicting terms in existing collective bargaining agreements. *ATDA v. UP*, NYD § 4 Arb. (Fredenberger, 1984); *UTU v. MP/UP*, NYD § 4 Arb. (Ables, 1985); and *BLE v. UP/MP*, NYD § 4 Arb. (Seidenberg, 1985). In an effort to distinguish those decisions, the Organization argues herein that the ICC recently tempered its perception of the outer limits of the Section 11341(a) exemption. Pointing to a footnote at page 25 of the ICC's Brief to the Supreme Court, the Organization submits that the ICC now asserts that the exemption applies ". . . only to terms comprehended by the Commission's approval order." The Organization concludes therefore, that the exemption is inapplicable to the Waycross-Raceland coordination. We disagree. The ICC's Opening and Reply Briefs do not include any definitive language demonstrating a modification of the ICC's

broad determination that its orders supersede the Railway Labor Act. Indeed, the footnote relied on by the Organization is appended to a statement asserting that the exemption mirrors the scope of the approved transaction. Elsewhere in its briefs, the ICC reiterates that the exemption goes beyond the transactions specifically mentioned in the approval proceeding so that railroads do not have to constantly return to the ICC to receive approval for each and every change made pursuant to the ICC's original order. At page 26, the ICC emphasized that the exemption arises automatically to cover "anything authorized or required" by an approval order. The last ICC pronouncement (more recent than the footnote cited by the Organization) is found at page 11 of its Reply Brief where the ICC declared:

> "The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction."

Although not expressed within the control application, the Raceland coordination is an approved transaction exempt from the Railway Labor Act.

However, the exemption is only triggered when necessary. The ICC has never indicated that an approved transaction can be utilized as a pretext for extinguishing or amending existing collective bargaining agreements. To the extent that terms of collective bargaining agreements and collective bargaining rights do not thwart or substantially impede the approved transaction, those agreements and rights are preserved. Therefore, there is some harmony between Section 11341(a) of the Interstate Commerce Act and Section 6 of the Railway Labor Act. 49 U.S.C. 11341(a); 45 U.S.C. 156. If feasible, the trans-

action should reasonably accommodate existing collective bargaining agreements and collective bargainning rights.

Next, the Organization urges us to draw a delicate distinction between Section 2 and Section 3 of the New York Dock Conditions. Prior merger protection agreements might be more inviolable than existing collective bargaining agreements because the prior merger agreements, like the Orange Book, were formulated under the auspices of Section 5(2)(f) (now Section 11347) of the Interstate Commerce Act. If so, the Organization correctly argues that the ICC must expressly relieve the Carriers from Orange Book provisions when it engages in a New York Dock transaction pursuant to an approval order issued subsequent to the order approving the ACL-SAL merger. Given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts New York Dock transactions from conflicting terms in prior merger protective agreements. To our knowledge, the ICC has not addressed this dilemma. In the *DRGW* case, the ICC did not patently rule that the exemption abrogates prior employee protective agreements such as the Orange Book. We cannot speculate on exactly how the ICC would handle prior merger protection agreements. However, as we discussed above, the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation. Moreover, most rights and benefits preserved to employees under Section 3 of the New York Dock Conditions will be safeguarded through prudent applications of the reasonable accommodation standard.

Therefore, this Committee has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland.

B. The Contents of an Implementing Agreement

1. **The Orange Book.** Section 2(b) of the Orange Book provides that a covered employee will not be deprived of employment or placed in a worse position with regard

to his working conditions at any time during such employment with the SCL. In exchange for lifetime protection, the Carriers acquired the right to transfer work and workers throughout the merged (SAL-ACL) system. See Orange Book Section 3(a). To that end, Section 3(a) calls for the execution of mandatory implementing agreements. Without such a clause, the point seniority terms of the working agreement would have restricted the Carriers from moving employees. Since it was necessary for the SCL to obtain a provision allowing it to transfer Orange Book protected employees throughout the merged system, it logically follows that a similar term is essential to permit the Carriers to transfer Orange Book covered workers beyond the SCL property. Instead, the Carriers desire to translate a limited, affirmative right into the unfettered discretion to transfer Orange Book workers throughout any enlarged rail system. An affirmative right carries an inherent implication that the right is restricted to the express terms conferring the affirmative right. The affirmative right is capped. Under the Carriers' interpretation, the Section 3(a) language would be unnecessary since they ostensibly have the right to transfer Orange Book employees throughout the SCL, L&N, B&O and the C&O. The parties do not enter into solemnly negotiated agreements only to have the terms of their agreements rendered meaningless or superfluous. The ACL and SAL could have foreseen that they might later become the part of an even larger rail enterprise. Thus, drafters of the Orange Brook could have easily written terms providing for unrestricted transfers across any enlarged rail system.

Our decision that the Carriers may not transfer Orange Book protected employees beyond the former SCL property is premised on the clear and express language of Section 3(a). While a past practice may not vary or alter the clear and unambiguous Orange Book language, the Carriers' reference to prior implementing agreements was insufficient to raise a consistent and genuine past prac-

tice even if Section 3(a) was susceptible to differing interpretations. The prior implementing agreements involved a modicum of Orange Book covered workers and under some of the agreements, the Orange Book employees could receive separation pay, an option they probably chose. The December 30, 1980 implementing agreement resulted in the transfer of Orange Book covered employees form the SCL to the C&O but only within the same city. In any event, the Organization voluntarily entered into the implementing agreement. Although other labor organizations have signed implementing agreements with the Carriers governing this transaction, at most there was only one Orange Book employee involved. Thus, these implementing agreements provide us with little guidance in interpreting the Orange Book.

Even though Orange Book Section 3(a) provides that the work of Orange Book protected employees may be transferred throughout the SCL property (but no further), the provision must be subordinated to the Carriers' right to engage in the authorized New York Dock transaction. Otherwise, the Carriers would be effectively thwarted from transferring all the Waycross freight car heavy repair work to Raceland. Unlike the work, the Orange Book limitation on transferring covered employees throughout the SCL system can be reasonably accommodated with the transaction. Permitting Orange Book covered workers to be transferred only throughout the SCL (absent a voluntary agreement with the Organization) will only slightly impair the transaction while preserving the essence of the Orange Book pursuant to Section 3 of the New York Dock Conditions. Even under the Carriers' proposed implementing agreement, some of the Orange Book employees would have exercised their seniority to remaining positions at Waycross in lieu of transferring to Raceland. In summary, this Committee emphasizes that whether or not Section 3(a) can be reasonably accommodated with a New York Dock transaction must be analyzed on a case by case basis.

Enforcing the limit on transferring Orange Book protected employees might, under different facts, operate to completely bar the transaction. Then, the ICC's authorized transaction would be paramount to Orange Book Section 3(a). In this case, the Carriers may not compel Orange Book protected workers to accept Raceland positions.

This Committee realizes that its decision will create an anomaly. The more senior Orange Book workers will be able to obtain other positions at Waycross. The junior Orange Book protected workers, who will presumably decline Raceland positions will collect Orange Book benefits. However, the Carriers have other alternatives under the Orange Book.

Despite the terminology in Orange Book Section 3(a), the New York Dock implementing agreement covering this transaction shall provide, without restriction, for the transfer of all freight car heavy repair work from Waycross to Raceland. As soon as the Carriers commence the transaction, Orange Book protected employees who are affected by the transaction must elect either New York Dock benefits or Orange Book protection. *BRAC v. SSR*, NYD § 4 Arb. (Zumas, 1983).

2. **Other Issues.** For the reasons discussed earlier in our opinion, the work and employees transferred from Waycross shall be placed under the C&O schedule Agreement. Maintaining the work or employees under the SCL working agreement would for all practical purposes, block the transaction. A reasonable accommodation is impossible since the terms of the working agreement conflict with the implementation of the transaction.

Regardless of whether Raceland or Waycross has the more comfortable climate, the Carriers would be barred from effectuating any New York Dock transaction if workers could decline a transfer merely by asserting that the weather at their current point was more amenable than the meteorological conditions at the coordinated location.

Most importantly, the Organization is unable to cite any term in any existing agreement vesting Carmen with the right to perform work in a particular climate.

Most of the Organization's other proposals concern the inclusion of benefits more generous than the minimum level of benefits prescribed by the New York Dock Conditions. When fashioning an implementing agreement, a Section 4 arbitrator must adhere to the New York Dock Conditions. *BRC v. C&O/SSR (L&N)*, NYD § 4 Arb. (Marx, 1984). The parties are, of course, free to incorporate benefits above and beyond those in the New York Dock Conditions. In addition, the Carriers cannot be bound to their earlier offers containing benefits greater than those in the New York Dock Conditions. No party would offer a compromise if the party could later be held to the offer. Conditioning an agreement on acceptance of a package deal is a common tactic in labor negotiations. Thus, the Carriers could properly withdraw their October 10, 1986 proposed implementing agreement without prejudice to their position before this Committee.

The BRC's General Chairman on the C&O petitions us to automatically certify (for New York Dock protection) an equivalent number of junior Raceland Carmen corresponding to the number of workers transferring into Raceland. Section 1 of the Carriers' proposal provides blanket New York Dock coverage for all workers (at any location) who are affected by the instant transaction. The Carriers' proposal is simple and straightforward. In the control case, the ICC rejected labor's position that any adverse employment effect should be conclusively presumed to be merge related. 363 I.C.C. 521, 589. Whether any Raceland worker is affected by this transaction and eligible for New York Dock protection must be referred to a Section 11 arbitration committee. Waycross employees moving to Raceland shall be dovetailed into the appropriate roster under the C&O Agreement.

Section 4 of the New York Dock Conditions charges us with selecting forces on a basis appropriate for this transaction. The BRC proposes that Waycross Carmen, who transfer to Raceland, retain their Waycross seniority and have a one time right of first refusal to a permanent Waycross vacancy. The New York Dock Conditions contemplate an orderly and final adjustment of forces during implementation of the transaction. Maintenance of dual seniority defeats that objective. Finally, the parties should incorporate the Carriers' proposed preference tires for filling Raceland positions. [See Section 3(f) of the Carriers' October 15, 1986 proposal.]

Due to our finding that, under the unique facts of this case, the New York Dock Conditions prevent the Carrier from transferring Orange Book protected workers to Raceland, the Carrier must be given an opportunity to reevaluate the number of positions to be either abolished at Waycross or established at Raceland. If the Carrier adjusts the number of positions at either point, the amendment should be incorporated into the implementing agreement.

In summary, this Committee adopts the Carriers' proposed implementing agreement dated October 15, 1986 with the modifications specified in our Opinion. The parties agree that the effective date of this Award shall be March 23, 1987.

AWARD AND ORDER

This Committee renders the following Award and Order:

1. The Committee has jurisdiction over the subject matter of this dispute;

2. The parties shall adopt the Carriers' October 15, 1986 proposal as the Implementing Agreement governing the Waycross-Raceland Coordination with the following modifications:

   a. Adopt any adjustment in the number of positions to be either abolished at Waycross or established at Raceland; and,

   b. Adopt a provision relating to Orange Book protected workers which is consistent with this Opinion;

3. The Answer to the Organization's Issue No. 1 is "Yes";

4. The Answer to the Organization's Issue No. 2 is "No";

5. The Answer to the Organization's Issue No. 3 is "Yes";

6. The Answer to the Organization's Issue No. 4 is specified in (2) above;

7. The Answer to the Question at Issue presented by the BRC General Chairman on the C&O is "No."

Dated: March 23, 1987

/s/ R.P. Wojtowicz, Dissenting
R.P. Wojtowicz
Employees' Member

/s/ J.T. Williams
Concurring in Part
And Dissenting in Part
J.T. Williams
Carriers' Member

/s/ John B. LaRocco
John B. LaRocco
Neutral Member

CARRIERS MEMBER'S CONCURRENCE AND DISSENT TO AWARD DATED MARCH 23, 1987, PURSUANT TO ARTICLE I, SECTION 4 OF THE NEW YORK DOCK CONDITIONS AND SECTION 4 OF THE NOVEMBER 3, 1966 MERGER PROTECTIVE AGREEMENT

I concur with the Committee's Award and Order in paragraphs 1, 2, 2(a), 3, 5, 7, and that portion of paragraph 6 that incorporates paragraphs 2 and 2(a). I dissent from the Committee's Award and Order in paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b), for the reasons set forth below.

I. The Committee's Interpretation of the Orange Book Is Completely Without Foundation in the Arbitral Record or the Agreement and Exceeds Its Jurisdiction.

The Orange Book Agreement is a merger protective agreement entered into by Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company on November 3, 1966, in connection with the ICC-autorized merger which created the Seaboard Coast Line Railroad Company (SCL).* Pursuant to Section 4 of the Orange Book, this Committee was constituted in part to determine whether the Orange Book prohibited transfer of Orange Book-protected employees from a freight car heavy repair facility at Waycross, Georgia, formerly an SCL location, to Raceland, Kentucky, on The Chesapeake and Ohio Railway Company (C&O). The conclusion of this Committee that the Orange Book prohibits transfer of protected employees and their work off the SCL property is completely without foundation in the arbitral record or the Orange Book itself and exceeds the Committee's jurisdiction. There is absolutely no language in the Orange Book

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* As a result of subsequent mergers and name changes, CSX Transportation, Inc., is the current successor of SCL.

that supports such a conclusion and the action of the Committee is tantamount ot ignoring its express provisions and to rewriting the Agreement.

The Committee places total reliance for its conclusion on section 3(a) of the Agreement, which provides, in relevant part:

> (a) In consideration of the foregoing employee benefits the Merged Company shall, subject to compliance with the provisions of Appendix F attached hereto, be entitled to transfer the work of the employees protected hereunder throughout the merged or consolidated system and the labor organizations will, subject to provisions contained in the Memorandum of Understanding attached hereto as Appendix G, enter into implementing agreements providing for the transfer and use of employees and allocation or rearrangement of forces made necessary by changes for which protection is herein provided and the employees, their organizations and the Carriers will cooperate to that end.

This language does not even purport to prohibit the transfer of work and protected employees off the former SCL system. The Committee's assertion that section 3(a) clearly and unambiguously prohibits such transfers is completely outside any reasonable reading of that section. Indeed, clear and unambiguous language to that effect could have easily been written, had such a limitation been intended, i.e.: " The Merged Company is prohibited from transferring work and protected employees off the property of the Merged Company as it exists on the date of merger." The Orange Book contains nothing even remotely resembling such language.

Section 3(a) quite simply authorized the SCL to transfer work and employees throughout its merged or consolidated system as it then existed as a result of the authouized SAL-ACL merger. The Orange Book does not include a prohibition on transfers off the SCL property. If any such

prohibitions exist, they must be found in the applicable working agreement, not in the Orange Book. Indeed, the Committee acknowledges at p. 35 of the Award that the source of any such restriction is the "point seniority terms of the working agreement." Thus, the affirmative transfer rights provided by the Orange Book overrode the working agreement by permitting transfers throughout the merged system.

Orange Book protected employees were not intended to have greater protections against transfers than non-protected employees; indeed, one purpose of the Orange Book was to eliminate any restriction against transfers in exchange for the protective benefits granted in that agreement.

The Committee is totally in error when it states at page 35 of the Opinion that the Carriers are attempting "to translate a limited, affirmative right [to transfer Orange Book employees throughout the SCL] into an unfettered discretion to transfer Orange Book workers throughout any enlarged rail system." The Carriers never urged that the Orange Book was the source of its right to transfer Orange Book employees from Waycross to Raceland. The Carriers never served a notice under the Orange Book to accomplish the transfer to Raceland. The source of the Carriers' right in this transaction is the ICC authorization and the *New York Dock* Conditions. The Carriers served a *New York Dock* notice under the ICC's *CSX-Control* authorization to accomplish not only the transfer of *work*, but equally as important, the transfer of Orange Book *employees* to Raceland. Where the carrier obtains the authorization to transfer its employees off former SCL property from an independent source, such as the instant ICC order and the accompanying *New York Dock* conditions, nothing in the Orange Book prohibits the exercise of that authority with respect to Orange Book-protected employees.

Contrary to the Committee's understanding, the Carriers never stated that Section 3(a) of the Orange Book provided the affirmative right to transfer employees to Raceland. The Carriers correctly asserted that Section 3(a) *did not prohibit* transfers off the SCL. It neither authorized nor prohibited such transfers because the Orange Book looked only to the SCL merger. Absent any such prohibition, the Committee exceeded its authority by fashioning one out of whole cloth.

Furthermore, the Committee's discussion of the Orange Book in Section B.2. completely ignores Section 2(e) of the Orange Book, which expressly provides that Orange Book protection may be terminated in case of an employee's "failure to obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements." This language is *not* limited to exercise of seniority rights on the SCL property. Rather, it requires the exercise of any seniority rights an Orange Book employee may have or may acquire under existing agreements at any point in time. Section 2(e) is full applicable to situations such as the present one where by virtue of an ICC-authorized *New York Dock* transaction, an Orange Book employee acquires seniority rights to a position available to him off the SCL property. In this case the Carriers, transaction results in Orange Book employees acquiring seniority rights to Raceland positions. The Committee's conclusion that an Orange Book employee can reject a position to which he has seniority rights and retain his Orange Book protection is flatly contrary to the express mandate of section 2(e) of the Orange Book. The Committee's Award effectively writes section 2(e) out of the Agreement.

The Committee's interpretation of the Orange Book is also contrary to all of the evidence submitted at the hearing. The Carmen submitted *absolutely no evidence* to support their claimed interpretation of the Orange Book.

Carriers, by contrast, submitted numerous implementing agreements with various crafts, including the Carmen, that explicitly provided that an Orange Book employee who declines a job off former SCL property *forfeits his Orange Book protection*. An Orange Book employee's only alternative to making a required relocation is to elect to resign in exchange for a lump sum separation allowance pursuant to Appendix G of the Orange Book.

These prior implementing agreements stand as unrefuted evidence of the parties' interpretation of the Orange Book. The first such agreement was entered into in 1967 and the Carmen were a party to it; more recently, such agreements were entered into less than two months prior to this arbitration hearing. The 1967 agreement is particularly compelling since it was entered into within one year of the Orange Book itself. These agreements establish that the parties have in fact applied the Orange Book precisely in accordance with the Carriers' position in this case: if an implementing agreement makes a position off the former SCL available to an Orange Book employee and that employee cannot otherwise hold an SCL position, the employee cannot decline the available position and retain his Orange Book protection.

The arbitral record contains no contrary evidence -- the Carmen could produce no implementing agreements which provided that Orange Book employees could decline positions off former SCL property and retain their Orange Book protection; nor could they cite even one instance where the Carriers attempted to transfer Orange Book employees off the SCL but were unable to do so because of any language in the Orange Book. Furthermore, the Carriers produced actual instances of approximately eighty Orange Book protected employees who were transferred off SCL property. The Carmen could not produce even one instance where an Orange Book-protected employee refused to transfer off former SCL property and retained

his protection. The implementing agreements unequivocally support Carriers' position that the Orange Book does not prohibit transfers off SCL property.

Carriers exhibited as part of their evidence in this case a prior New York Dock Section 4 arbitration award on this property in which the Neutral Member of this Committee (LaRocco) held:

> "Article I, Section 4 provides for the selection of forces which is most appropriate in each case. *The most reliable evidence for determining the appropriate method of allocating forces in this case is to look at how the parties resolved a similar issue in the past.*" (emphasis added)

In the case at hand, the Carriers submitted in evidence a dozen implementing agreements with the Carmen and other unions party to the Orange Book, all of which contemplated the transfer of Orange Book employees off the SCL to other railroads. Despite "looking" at these instances of how the parties interpreted the Orange Book in the past, this same Neutral Member (LaRocco) unaccountably chose to discount the implementing agreements as providing "us with little guidance in interpreting the Orange Book." Opinion at p. 36.

Of the dozen implementing agreements submitted in evidence by the Carriers, the Committee chose to discuss one – a 1980 agreement – which it noted involved transfers within the same city, but for reasons unexplained, ignored the several other agreements involving transfers between different cities. Although the Carriers' evidence clearly showed the actual names of more than eighty Orange Book employees who did transfer off the SCL to other railroads, the Committee described that number as a "modicum" and speculated without foundation that the Orange Book employees "probably" opted for a separation allowance in lieu of transferring. The Committee ignored the fact that separation allowances would have been available in the present transaction to those Orange

Book employees who prefer that option to transferring to Raceland.

The Committee at page 36 lays the erroneous foundation that the language of Section 3(a) is "clear and express" in prohibiting transfers of Orange Book employees off the SCL in order to discount the compelling evidence of past practice presented by the Carriers and to divert attention from the glaring lack of evidence presented by the Carmen. The Committee then characterizes the Carriers' evidence as "insufficient to raise a consistent and genuine past practice." An unbiased review of the record reveals a dozen implementing agreements which contemplated transfers of Orange Book employees off the SCL. The Carmen produced no implementing agreements at all. Thus, 100% of the evidence demonstrated a consistent and genuine past practice of twenty years' duration supporting the Carriers' position. There is absolutely no support in any of the agreements for existence of an Orange Book prohibition against transfers off SCL property.

The Committee also implicitly suggests that the organizations may have voluntarily waived Orange Book rights of their members. This suggestion is ludicrous. There is only one explanation why time after time over a twenty year period organizations acknowledged that Orange Book employees must accept positions off SCL property: they had no choice, because the Orange Book itself did not protect the employees against the required transfers.

The foregoing agreements and evidence flatly controvert the Committee's conclusion that an Orange Book employee may refuse to transfer off SCL property and still retain his Orange Book protection. They compel the finding that an Orange Book employee has no such right.

Finally, Carriers submitted an affidavit from C. E. Mervine, the retired Senior Vice President - Labor Relations who participated in the Orange Book negotiations, which was in complete harmony with the history of the

parties' actions as evidenced by the implementing agreements. For example, the affidavit states:

> 10. . . . I have particularly noted Mr. McAlpine's claims that the Orange Book insulates an employee protected under its terms from being required to transfer to locations other than those on the former Seaboard Coast Line property. Mr. McAlpine is in error, because from my knowledge of the Orange Book and its terms, and being very familiar with its intent, I can state that it grants no such right to employees protected thereunder; nor did the parties signatory to the Orange Book ever intend or contemplate that Orange Book protected employees would ever have or secure such rights.

The Carmen produced no contrary evidence from any union negotiators. The Committee simply ignored the affidavit, which makes clear that the Orange Book does not permit protected employees to refuse transfers off former SCL property and retain protection.

The Committee, acting in its capacity under Section 4 of the Orange Book Agreement, has exceeded its jurisdiction by reaching an interpretation of the Orange Book that disregards the express language of that Agreement as well as the unrebutted evidence in the record. The interpretation is wholly baseless and fails to draw its essence from the Orange Book or the record before the Committee; accordingly, I dissent.

II. The Committee Errs in Refusing to Supersede its Perceived Limitation on the Transfer of Orange Book-Protected Employees.

Separate from and independent of its erroneous conclusion discussed above, the Committee errs in refusing to carry out its obligation under the Interstate Commerce Act and Article I, Section 4 of the *New York Dock* Conditions to supersede those provisions of the Orange Book that the Committee finds limit Carriers' authority to

transfer Orange Book-protected employees from Waycross to Raceland.

In refusing to supersede this perceived contractual limitation, the Committee has erroneously applied the very I.C.C. decisions that it recognizes establish the proper standard under the Interstate Commerce Act and that it purports to follow. Those decisions establish that contractual and other legal limitations that "conflict with" a carrier's proposed implementation of an I.C.C.-approved "transaction" are, as a matter of law, superseded as a result of section 11341 (a) of the Interstate Commerce Act. Because a limitation on the transfer of Orange Book-protected employees clearly "conflicts with" the authorized transaction, as the Committee recognizes in its Opinion, the Committee should have approved the Carriers' proposed implementing agreement that would have required such employees to follow their available work from Waycross to Raceland.

At page 33 of its Opinion, the Committee correctly concludes that "the Raceland coordination is an approved transaction." Indeed, as the Committee accurately observed, the Carmen acknowledged the the "transfer of freight car heavy repair work from Waycross to Raceland constitutes a New York Dock transaction." Opinion at 29-30. Thus, the proposed transfer of work is an "action taken pursuant to authorizations of [the Interstate Commerce] Commission" in *CSX-Control. New York Dock* Conditions, Article I, Section 1 (a).

The Committee also correctly recognizes at page 33 of its Opinion that, as an I.C.C.-approved transaction, the proposed transfer is "exempt from the Railway Labor Act" as a result of the provisions of section 11341 (a) of the I.C.A., which provides in relevant part that:

> "A carrier . . . participating in that approved or exempted transaction is exempt from the anti-trust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . ."

Moreover, the Committee properly recognizes that, under Article I, Section 4 of the *New York Dock* Conditions, it serves as "a quasi-judicial extension of the ICC" and, as such, "must strictly follow the ICC's interpretation of its own authority." Opinion at 31. The Committee acknowledges that the I.C.C.'s definitive interpretation of its authority under the Interstate Commerce Act is contained in its *D.R.G.W.* decision.

The standard articulated by the I.C.C. in its *D.R.G.W.* decision is a clear one and is quoted by the Committee in its Opinion:

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added); Opinion at 17.

As the I.C.C. explained in its SupremeCourt reply brief in *B.L.E.* v. *I.C.C.*:

> "Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not *conflict with* implementation of anapproved transaction." Opinion at 33 (emphasis added).

Thus, the I.C.C. has definitively interpreted the I.C.A. and its own labor protective conditions as protecting existing collective bargaining agreements and existing working conditions only insofar as such agreements and conditions do not *conflict with* a carrier's proposed implementation of an I.C.C.-approved action such as the Waycross-Raceland consolidation. In the event of any such conflict, section 11341 (a) of the I.C.A. comes into play, and the conflicting limitation, regardless of its source, is superseded as a matter of law.

Notwithstanding its express recognition that it must "strictly follow" the I.C.C.'s interpretation and its quotation of the "conflict with" standard artculated by the Commission, the Committee errs at page 3[illegible] of its Opinion when

it creates the following additional condition for the supersession of the terms of existing collective bargaining agreements that conflict with the proposed implementation of a carrier action that has I.C.C. approval:

> "To the extent that terms of collective bargaining agreements and collective bargaining rights do not *thwart or substantially impede* the approved transaction, those agreements and rights are preserved. (Emphasis added.)

The Committee adopts this additional condition based on its erroneous determination that an "accommodation" is required between a proposed transaction and existing collective bargaining agreements and collective bargaining rights. Opinion at 33.

The Committee's stringent "thwart or substantially impede" condition is directly contrary to the "conflict with" standard articulated by the I.C.C. in *D.R.G.W.* Moreover, the Committee's conclusion that the I.C.C. has empowered it to engage in some sort of standardless balancing of the Carriers' right to implement the proposed transaction with the Carmen's asserted collective bargaining rights in order to achieve a "reasonable accommodation" is flatly inconsistent with the Commission's *D.R.G.W.* decision and its subsequent decision in *Maine Central.** The Committee's position improperly delegates unto itself the power to rewrite the transaction and make the business decision as to how the transaction should be structured.

In both *D.R.G.W.* and *Maine Central* the unions argued that existing collective bargaining agreements and working conditions could not be superseded because of the provisions in the Commission's labor protective conditions, such as those found in Article I, Sections 2 and 3 of the *New York Dock* Conditions, that preserve such agreements

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* *Maine Central R.R. Co., Georgia Pacific Corp., Canadian Pacific Ltd. and Springfield Terminal Ry Co. – Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (1985).

and working conditions. The Commission flatly rejected this contention:

> "The labor conditions imposed under section 11347 preserve conditions and agreements *in the context of* the authorized transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).*

In rejecting labor's argument, the Commission did not provide that any sort of "reasonable accommodation" of the proposed transaction with such agreements was appropriate or permissible. Nor did the Commission state that only those collective bargaining agreements that would go so far as to "thwart or substantially impede" the approved carrier action are superseded. Indeed, the Commission directed that,

> "To the extent that existing working conditions and collective bargaining agreements *conflict with* a transaction which we have approved, those conditions and agreements *must give way* to the implementation of the transaction." *D.R.G.W.*, slip op. at 6 (emphasis added).

Thus, the Commission has authoritatively interpreted I.C.A. Section 11341(a) and its own labor protection conditions as requiring the supersession of any terms of existing collective bargaining agreements that *conflict with* a proposed carrier implementation of an approved transaction. The carrier need not show that the proposed implementa-

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* The Commission rejected a similar argument in *Maine Central*:

> "For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisons to supersede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions. *Maine Central*, slip op. at 7n. 11.

tion would be impossible or even extremely difficult absent freedom from contractual limitations. Such limitations "must give way," in the words of the I.C.C. in *D.R.G.W.*, whenever they "conflict with" the implementation of an approved transaction.

Had the Commission simply applied the "conflict with" standard as articulated by the I.C.C. in *D.R.G.W.*, it is apparent that it would have approved the Carrier's proposed implementing agreement and would have provided for the transfer of Orange Book-protected employees. The limitation on such a transfer that the Committee erroneously found in the Orange Book "conflicted with" Carriers' proposed implementation of the I.C.C.-approved transaction, since the transaction clearly included the transfer of Orange Book employees from Waycross to Raceland. The Orange Book prohibition that would restrict the Carriers from being able to transfer Orange Book employees with their work to Raceland clearly conflicts with the approved transaction.

The impact of the Committee's error in interpreting its own authority is severe. Carriers proposed to establish 86 carmen positions at Raceland. Of the 86 Waycross carmen who should be required to follow their work to Raceland, 57 have Orange Book protection. Under the Committee's award, these 57 Waycross employees can refuse to accept positions at Raceland, and continue to receive full pay despite the authorized transfer of their heavy repair work to Raceland. The Committee is in error when it claims at p. 37 of its Opinion that some of those employees could exercise seniority to remaining positions at Waycross. After the transfer of the work, there will be no existing positions at Waycross to which these 57 carmen can exercise seniority. The annual cost of carrying these 57 Orange Book employees on the payroll is *well in excess of $2 million*. In cavalier fashion, the Committee finds at page 37 that this burden "will only slightly impair the transaction." In fact, the Committee's conclusion presents a severe

conflict with implementation of the proposed coordination of repair work at Raceland.

As explained above, leaving in place the perceived limitation on the transfer of Orange Book employees will impose enormous costs on the Carriers that will substantially diminish, if not wholly consume, the economies and operating efficiencies associated with the proposed shop consolidation. Under any definition, such a limitation will "substantially impede" the authorized transaction, and cannot represent a "reasonable accommodation" of the transaction and the perceived Orange Book restriction. Thus, even if the additional condition applied by the Committee – that only those contractual limitations that would "thwart or substantially impede" an approved carrier action must "give way" – is a correct interpretation of the Interstate Commerce Act and the *New York Dock* Conditions, the Committee erred in its application of that additional condition in this case.

This nation's transportation policy has for decades been to foster and encourage the consolidation of rail carriers so as to obtain economies and efficiencies in furtherance of the public interest. Congress, through the Interstate Commerce Act, and the ICC have declared that legal and contractual impediments that conflict with the implementation of such consolidations must give way. The Committee's failure to follow the "conflict with" standard of the ICC and its refusal to supersede the perceived Orange Book limitation are flatly inconsistent with the underlying purpose of the Interstate Commerce Act and the ICC's consolidation approval in *CSX-Control*.

Accordingly, I dissent from paragraphs 2(b), 4, and that portion of paragraph 6 that incorporates paragraph 2(b) of the Committee's Award and Order.

/s/ J. T. WILLIAMS
J. T. WILLIAMS
Carriers' Member

DISSENT OF EMPLOYEES' MEMBER

I dissent from the award and each material finding and conclusion contained in the Majority Opinion except that which affords the employees their Orange Book protection, however, I dissent from the Majority Opinion's reservations regarding even that protection.

The opinion and award in this case commit three egregious errors, all of which were called to the Neutral Member's attention and all of which were distainfully rejected or ignored.

With this decision we have almost reached the nadir in the application of what may now be ludicrously referred to as "employee protective" conditions. The Commission at one time agreed with the Congress and the courts that it could not inject itself into the area of labor relations except to the extent Congress permitted it to do so in protecting the monetary and contractual rights of employees affected by "actions taken pursuant to authorizations of the Commission." The Commission emphasized the protections it had designed as being "imposed upon railroads" for the "protection of employees".

The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations. However, no Commission ruling has gone so far to destroy the Railway Labor Act and collective bargaining agreement rights of employees as has the Neutral and Carriers' Members of this Committee in their decision in this case.

In every case in which the Commission has *held* it can supersede Railway Labor Act and collective bargaining agreement rights of employees by virtue of the existence of Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. §11341(a), it has done so based upon a claim that the specific carrier "action " had been presented to and 'approved" by the Commission in its approval of the financial transaction presented to it, e.g., a crew assignment provision in an ICC-approved trackage rights agreement.

The carrier "action" proposed here was never presented to or considered by the Commission. The Commission did not "approve" it. The only provisions in the Commission's orders affecting this case are contained in Sections 2 and 3 of the *New York Dock* conditions prohibiting interference with employee Railway Labor Act and collective bargaining agreement rights which sections the Majority Opinion herein considers ineffective.

The most basic and material error contained in the opinion, an error rendering invalid the entire proceeding, is factual and cannot be disputed. Section 4 of *New York Dock* requires a carrier to provide the representatives of their employees "a full and adequate statement of the changes to be effected." It cannot be reasonably disputed that the carriers' notice in this case did not satisfy that requirement. The BRC, as the employees' representative, had "heard" that some work in the Waycross shop was to be transferred to "some point" other than Raceland and sought to find out from the carrier the amount and identity of the work to be moved to Raceland but were rebuffed. [BRC-Div. of BRAC Submission, p. 20]

Following the hearing in the instant case, an injunction proceeding was brought in the U.S. District Court and during the course of a hearing before that Court it developed that the hopper car work which had been performed at Waycross for many years and constituted fully 50% of the "freight car heavy repair work" at Waycross was being transferred to Tampa. In a letter addressed to William G. Mahoney, Attorney for BRC Division of BRAC, and James D. Tomola, Attorney for CSX, the Neutral and Carriers' Members rejected BRC's request for the reopening of this proceeding in order to receive the new evidence developed before the federal court on the ground that "the work is a special covered hopper car program" (apparently the Carriers' Member so informed the Neutral Member after the hearing and the Neutral Member took him at his word) and because "the organization was aware before the arbitration hearing that this work was being transferred to

Tampa", referring to page 20 of BRC's Submission. But the statement on page 20 merely emphasizes the inadequacy of the carriers' notice. Certainly, there is no indication on that, or any other page of its Submission that BRC knew before the arbitration hearing that 50% of the freight car heavy repair work was being transferred to Tampa. (A copy of the letter rejecting the BRC's Motion to Reopen and a copy of the page 20 relied upon by the Neutral and Carriers' Members is appended to this dissent.)

The Notice of August 29, 1986 was inadequate and misleading, because it clearly indicated and led the BRC *and the Neutral* to believe that *all* freight car heavy repair work was being transferred from Waycross to Raceland at a time when fully one-half of it was being transferred to Tampa. Indeed, as noted below, the Majority Opinion relies heavily on this factual error. Therefore, the entire proceeding should have been ruled invalid, or at the very least, the proceeding should have been reopened to permit the issue of the Tampa work to have been fully developed. If that opportunity had been afforded BRC, it could have been demonstrated that the "work [was not] a special covered hopper car program" as found by the Neutral and the Carriers' Members in the letter of March 20, 1987, appended hereto, and that the work comprised at least 50% of the freight car heavy repair work being transferred.

The Majority Opinion confirms that it is based upon a substantial and substantive factual error, viz, that *all* freight car heavy repair work was being transferred to Raceland. At page 29, the Neutral and Carriers' Members find that the notice satisfied Section 4 and because "*all* freight car heavy repair work will be transferred to Raceland and thus, the Carriers did not have to quantitatively or qualitatively describe the freight car repair work" in their Section 4 notice. Of course, one-half of the freight car repair work was being transferred to Tampa rendering the foregoing factual finding clearly in error.

At page 34 of the Majority Opinion, it is found that the arbitration committee "has jurisdiction to formulate an implementing agreement governing the transfer of work and employees from Waycross to Raceland." No mention is made of the fact that one-half of that work has now been transferred to Tampa.

At page 37, in determining that it has the right to supersede the Railway Labor Act and collective bargaining agreement rights of the employees, the Majority of the Committee finds: "Otherwise the Carriers would be effectively thwarted from transferring *all* the Waycross freight car heavy repair work to Raceland." And, again at page 38, the Neutral and Carriers' Members of the Committee determined that the agreement they shall write and impose upon the employees "shall provide, without restriction, for the transfer of *all* freight car heavy repair work from Waycross to Raceland."

The repeated findings of fact that "all freight car heavy repair work" was going to be transferred from Waycross to Raceland is simply erroneous. The statement on page 20 of the Submission, appended hereto, as well as the notice and the findings of fact on "all " work dramatize the inadequacy of the notice and the basic unfairness demonstrated by the Neutral and Carriers' Members in this case in refusing to reopen this proceeding to review the facts which contradict the findings and by the Neutral Member's acceptance of an unsubstantiated statement that the "work is a special covered hopper car repair program."

The Majority of the Committee conclude at page 31 that "transactions leading to more efficient operations frequently contradict the Railway Labor Act's policy of avoiding disruptions to interstate commerce by promoting collective bargaining." The decision then goes on to conclude that the two Acts are not to be accommodated to each other but that in every case where some efficiency is employed by a carrier following a control or merger approval by the ICC, and whether or not it was brought to the attention

of the ICC and whether or not the Interstate Commerce Act gave the ICC independent authority to approve it, the Railway Labor Act must give way to the railroad's desires.

The Interstate Commerce Act, of course, does *not* empower the ICC to approve or disapprove yard or shop consolidations. When operational changes, such as yard or shop consolidation not under ICC jurisdiction, are presented to the ICC during the course of a merger or control proceeding, the ICC looks at them only insofar as they might render the transaction before it consistent or inconsistent with the public interest. The ICC has no independent statutory jurisdiction over such activity. The carriers do not require ICC authority prior to the consolidation of yards or shops whether such consolidations are intra- or inter-carrier. (Obviously, inter-carrier consolidations of shops would make little economic or operational sense unless the carriers involved were already under common control.)

If the ICC did not review a particular consolidation during a control or merger proceeding prior to approving the merger or control, it cannot thereafter approve or disapprove it under the Interstate Commerce Act. The carrier could not "constantly return to the ICC to receive approval" for each and every change made pursuant to the ICC's original order about which the Majority lavishes such concern at pages 32-33 of its opinion, simply because the I.C.C. does not have the statutory authority to approve such consolidations.

If the Interstate Commerce Act contains no ICC authority to approve a shop consolidation such as that described in the notice issued in this proceeding, then that Act cannot possibly be in conflict with the provisions of the Railway Labor Act much less prevail over the Railway Labor Act in an area which the Interstate Commerce Act does not even attempt to regulate.

The Majority Opinion is clear in its conclusion that all collective bargaining agreements, even pre-existing

employee protection agreements executed in earlier merger cases with the same carriers, are eliminated by the "ICC authorized transaction" if they "operate to completely bar the transaction". (Majority Opinion, page 37.)

The opinion, however, uses such vague, general and undefined terms as to render extinct the Railway Labor Act rights of employees in all cases.

At page 33, for example, the ICC is quoted as stating that the Section 11341(a) "exemption arises automatically to cover 'anything authorized or required' by the order. " The conclusion is then reached that "the Raceland coordination is an approved transaction exempt from the Railway Labor Act." Aside from the fact that the ICC has no statutory authority to approve the "Raceland coordination" after it has approved a transaction of which the coordination may be a result, the Majority Opinion concludes [page 33] that §11341(a) "is only triggered when necessary." The implication here, therefore, is clear that the "Raceland coordination" is "necessary" because the "Raceland coordination" is repeatedly referred to as an "approved" or "authorized transaction" [see pp. 33, 37].

The "Raceland coordination" was not approved during the course of the control case before the Commission because it was never presented to the ICC. The ICC could not now approve the "Raceland coordination" because it is not given jurisdiction over shop consolidations by the Interstate Commerce Act. Therefore, the implication plainly arises from the Majority Opinion that *any* action or activity that meets the definition of a "transaction" as found in Section 1(a) of *New York Dock* is immunized from the provisions of the Railway Labor Act and only "if feasible", whatever that may mean, "the transaction should reasonably accommodate existing collective bargaining agreements and collective bargaining rights" [pg. 33].

At pages 34-37, the Majority Opinion recognizes the transfer restrictions which Section 3(a) places upon the carriers [Majority Opinion, pg. 36] and acknowledges that

"given the mandate in Section 11347, there is some doubt that Section 11341(a) exempts *New York Dock* transactions from conflicting terms in prior merger protective agreements" and that "the ICC has not addressed this dilemma" [pg. 34]. However, the Majority Opinion then dismisses the specific requirement of Section 3 of *New York Dock* which preserves to an employee "the rights or benefits . . . which such employee may have under any existing job security agreement", such as the Orange Book in this proceeding, and which expresaly provides that employee an unlimited election "between the benefits under this appendix [*New York Dock*] and similar benefits under such other arrangement", with the statement that "the ICC has emphasized that a transaction hurdles all legal obstacles preventing implementation." [Pg. 34.]

The Majority Opinion then observes that "most rights and benefits preserved to employees under Section 3 of the New York Dock conditions will be safeguarded through prudent applications of the reasonable accommodation standard" [pg. 34] but, later concludes that the "ICC's authorized transaction would be paramount to Orange Book Section 3(a)" if it "would operate to completely bar the transaction" [pg. 37]. No indication is given of what might be considered a "complete bar to the transaction". Certainly, as applied by the Majority Opinion, the Orange Book could not bar the "Raceland coordination" even if all employees involved were covered by its provisions although such a coordination in those circumstances would cost the carrier more money. Apparently, the expenditure of money in the protection of the rights of the employees would constitute a "bar" to the transaction. This would seem to be a reasonable conclusion since prior to the "Raceland coordination" the Orange Book had never been a "bar" because exemptions have always been negotiated permitting transfers. Now apparently they are all to be arbitrated because of this purported "bar" found by the Majority.

Because of its misuse of terms; its vague use of terms; and, its conclusions in contradiction of the facts, this

Majority Opinion will be utilized by all carriers in future proceedings in attempts to strip the Railway Labor Act rights and collective bargaining agreement rights of every employee involved in a coordination since apparently any efficiency or convenience of operations made attractive by a merger or common control of a carrier can be carried out as if it had been "authorized and approved" in advance by the ICC even where the ICC has been given no statutory jurisdiction to approve or authorize that particular activity or even has been made aware such activity may ever occur.

For the foregoing reasons, the Employees' Member of the Arbitration Committee dissents from an unfair, inequitable, and flagrantly erroneous majority opinion and award in this proceeding.

/s/ R.P. Wojtowicz
R.P. Wojtowicz
Employees' Member

CARRIERS' MEMBERS' REPLY TO DISSENT OF EMPLOYEES' MEMBER

1. The Employees' Member in his Dissent claims that the Committee erra in finding the Carriers' notice to be adequate and in failing to grant the Carmen's motion to reopen the hearing based on alleged discovery of new evidence. The adequacy of notice issue is a red herring that simply reflects the Carmen's continuing efforts to block the transaction through any means possible, however remote.

The Employees' Member's Dissent is based on a manifest misreading of the Carriers' written notice of the transaction that was provided to the Carmen on August 29, 1986. That notice clearly indicated that on or about December 31, 1986, the Waycross freight car heavy repair shop would be closed, and that all freight car heavy repair work and certain storeroom work then to be performed at Waycross would be transferred to Raceland, Kentucky. The notice indicated, by craft, the number of positions that the Carriers expected would be abolished at Waycross, and the number of positions that would be established at Raceland as a result of this transaction. The Carmen responded just four days later indicating that they would attempt to block the transaction and claiming, among other things, that the notice was inadequate.

The Employees' Member's Dissent misreads the notice and misrepresents the transaction by focusing on a particular covered hopper repair program that was to be performed at Tampa rather than at Waycross in 1987. Both the Neutral and the Carmen clearly understood that under the notice such work was not to be transferred to Raceland because the notice encompassed all work to be performed at Waycross at the expected time of implementation of the transaction in 1987. Indeed, the Carmen's prehearing Sub mission acknowledges at p. 20 that they were specifically informed during negotiations that the transfer to Raceland

included all heavy repair work otherwise to be performed at Waycross in 1987.

The Committee properly concluded at p. 29 that, since Waycross would be closed and all future Waycross heavy repair work would be transferred to Raceland, "the Carriers did not have to quantitatively or qualitatively describe the freight car repair work." More significantly, the Committee properly found that the notice requirement was met by the Carriers' good faith estimate of the number of employees that would be required to perform the quantum of work that would be transferred to Raceland. "Also the Carriers in good faith, estimated the number of employees in each class who would be involved in the force rearrangement. The notice laid the groundwork for meaningful negotiations. The Organization can hardly contend that it was ill-prepared for bargaining." Opinion at 29.

The Employees' Member's Dissent at p. 4 erroneously suggestes that the Carmen and the Neutral were somehow misled and that a factural error underlies the Committee's Opinion. No factual error has been made. The transaction always contemplated, and the Carmen and the Neutral clearly understood, that all heavy repair work that would have been performed at Waycross in 1987 was to be transferred to Raceland.

As recognized by the Committee, the Carmen's immediate and adamant opposition to the transaction in its entirety exposes its claim of notice deficencies as simple obstructionism; the Carmen knew immediately what the proposed transaction involved and decided to attempt to block the transaction in any way possible.

The Carmen continued their obstructionist tactics with a last minute request to reopen the aritration hearing based on alleged discovery of new evidece – the alleged transfer of covered hopper repair work from Waycross to Tampa – at a court hearing on January 9, 1987. The Employees' Member's Dissent completey misrepresents the facts and the basis for denial of that motion.

Carriers responded to the Carmen's motion by letter (copy attached hereto) which showed that no new evidence was discovered on January 9 that would justify reopening the hearing. Specifically, Carriers' letter informed the Committee that BRC General Chairman McAlpine testified on January 9 that he was aware of the alleged transfer of repair work from Waycross to Tampa no later than September 10, 1986, more than three months prior to the arbitration. Further, Carriers explained that the subject of the 1987 Tampa covered hopper repair program was raised by the Carmen and fully explained by Carriers officials at an October 1, 1986 meeting, more than two months prior to the arbitration. Carriers' letter stated that at the October 1 meeting, "Carriers' officials clearly and unequivocally explained that a covered hopper repair program was being assigned to Tampa for 1987, that Carriers had the right to determine where this repair program would be performed, that it had been performed at Tampa in the recent past, and that this program was not part of the 1987 car repair work at Waycross which was being transferred to Raceland." The Carmen could not and did not deny these facts in response to Carriers' letter. To the contrary, General Chairmen McAlpine testified in court that Tampa had historically performed repair programs on the same type cars as Waycross and that the Carriers had the right to determine whether a particular car repair program would be assigned to Tampa or Waycross.

The Carmen's knowledge of the 1987 Tampa repair program and their arguments based on the transfer of work from Waycross to Tampa are reflected in the Carmen's initial Submission to the Committee at p. 20. Thus, the conclusion of the Committee in its March 23 letter that freight car repair work going to Tampa is not new evidence justifying a reconsideration of the adequacy of the Carriers' notice is entirely proper.

The Carmen had more than adequate opportunity to challenge the Carriers' notice at the December 18 hearing based on the 1987 Tampa hopper repair program, which

they admittedly were aware of no later than September 10, 1986. That program represents work that would not be performed at Waycross in 1987, regardless of any transfer of Waycross positions to Raceland. The Carmen's allegation that 50% of 1986 Waycross work was being transferred to Tampa was unsubstantiated and erroneous, did not represent new evidence, was irrelevant to the adequacy of Carriers' notice, and afforded no basis for reopening the arbitration hearing.

2. It is apparent from the Employees' Member's Dissent that his primary dispute in the remaining portions of his Dissent is with the decisions of the Interstate Commerce Commission that have ruled that the Railway Labor Act and provisios of private collective bargaining agreements must "give way" when they "conflict with" the proposed implementation of an approved carrier consolidation or merger. He states in his dissent at p. 1: "The Commission, in the opinion of this Member, has irresponsibly strayed from the path it formerly travelled with regard to labor relations." The Committee properly recognized, however, that as an arm of the I.C.C. performing functions delegated to it under Article I, Section 4 of the *New York Dock* Conditions, this Committee was bound to adhere strictly to the Commission's interpretation of the Interstate Commerce Act and *New York Dock*.

The Employees' Member goes further, however, and accuses the Committee of improperly expanding the Commission's decisions to include situations where the carrier action allegedly "was never presented to or considered by the Commission." This charge is based on both an inaccurate factual premise and on a fundamental misunderstanding of the authority conferred on these Carriers in *CSX – Control*.

First, as the Committee's decision notes, the Carmen acknowledged during the proceedings before the Committee that the proposed shop consolidation here was a "transaction" within the meaning of *New York Dock* and that

this carrier action was, accordingly, taken pursuant to the authority the Commission conferred on the Carriers to create a single, consolidated rail system in *CSX – Control*.

BRC's admission is conclusive in this case. Since the shop consolidation is a *New York Dock* transaction, it is a transaction authorized by the I.C.C.; *i.e.*, it is admittedly an "action taken pursuant to authorizations of this Commission in which these provisions have been imposed." As an authorized transaction, the shop consolidation is governed by the I.C.C. policy atriculated in *D.R.G.W.* and *Maine Central* whereby collective bargaining agreements and Railway Labor Act rights are superseded to the extent they conflict with the authorized transaction. In view of the Carmen's admission, the scope of the authority conferred by the Commission on the Carriers in *CAX – Control* and the legal consequences that flow therefrom, whether or not the shop consolidation was specifically presented to or considered by the I.C.C. is simply not relevant.

Second, although the precise consolidation of the Waycross and Raceland shops now proposed was not identified in the short-term operating plan presented to the Commission in *CSX – Control*, the record in the proceedings before the Commission was replete with references to the acknowledged fact that, following the grant of control authority, the Carriers would engage in such consolidations where deemed to be economic and cost-efficient. Indeed, as Carriers demonstrated at pp. 16-21 of their initial submission, representatives of rail labor repeatedly stressed to the Commission that such consolidations would occur. Thus, the fact that there would be future consolidations was indeed "presented to" the Commission.

Third, the Commission clearly "considered" such long-term consolidations and the effects on employees in its decision in *CSX – Control*. As set forth at pp. 22-23 of Carriers' submission, the Commission acknowledged that "additional coordinations may occur that could lead to further employee displacements" but concluded that its standard

labor protection condition "will adequately protect those employees now identified as affected by the consolidation as well as those who may be affected in the future, but are not now identified specifically." *CSX – Control*, 363 I.C.C. at 589.

Thus, in approving the establishment of a single, consolidated CSX rail system, the Commission clearly found that not only the immediate consolidation of facilities and coordination of operations described in Carriers' short-term operating plan but also the long-term implementation of "additional coordinations" was in the public interest. In granting control authority, the Commission found it to be in the public interest that the Carriers be managed with "fully coordinated or integrated facilities and operations." *Peoria & E.Ry. Co. Stockholders v. New York Central R.R. Co.*, 334 I.C.C. 131, 151 (1968).

The attempt by the Employees' Member to draw a line between those facility consolidation that are specifically referred to in the short-term operating plan (and that, accordingly, can be carried out notwithstanding the RLA and any limitations in existing collective bargaining agreements) and those that are encompassed within or are pursuant to the control authority but are proposed some time after the I.C.C. proceedings are completed (and that, according to the union, can be carried out only after obtaining the union's permission through the long, drawn-out negotiating processes of the RLA) is a specious one that has no basis in the terms of the I.C.A. or prior I.C.C. decisions and indeed is inconsistent with the Carmen's admission that the Waycross-Raceland consolidation constitutes a *New York Dock* transaction under *CSX – Control*.

/s/ J. T. Williams
J. T. Williams
Carriers' Member

RESPONSE TO DISSENT

The Neutral Member of this Committee has invited each partisan member of the Committee to respond to the dissent of the other partisan member. I believe such responses to be novel, inappropriate, if not improper, and to serve no constructive purpose. Consequently, I will not respond to the dissent filed herein by the Carriers' partisan member of this Committee.

/s/ R. P. Wojtowicz
R. P. Wojtowicz

Transportation Act of 1920, § 407, 41 Stat. 480:

Sec. 407. The first paragraph of section 5 of the Interstate Commerce Act is hereby amended to read as follows:

• • •

(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the "antitrust laws," as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.

Emergency Railroad Transportation Act of 1933

Title I, § 10(a), 48 Stat. 215:

Sec. 10. (a) The carriers or subsidiaries subject to the Interstate Commerce Act, as amended, affected by any order of the Coordinator or the Commission made pursuant to this title shall, so long as such order is in effect, be, and they are hereby, relieved from the operation of the antitrust laws, as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by law, State or Federal, other than such as are for the protection of the public health or safety, in so far as may be necessary to enable them to do anything authorized or required by such order made pursuant to this title: *Provided, however,* That nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act.

Title II, § 202, 48 Stat. 217-19:

Sec. 202. Such section 5 is further amended by striking out paragraphs (6), (7), and (8), and by inserting in lieu thereof the following paragraphs:

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(15) The carriers and any corporation affected by any order made under the foregoing provisions of this section shall be, and they are hereby, relieved from the operation of the antitrust laws as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions by or imposed under authority of law, State or Federal, insofar as may be necessary to enable them to do anything authorized or required by such order.

Transportation Act of 1940, § 7, 54 Stat. 908-09:

Sec. 7. Section 5 of the Interstate Commerce Act, as amended, is amended to read as follows:

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(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporation, and their officers and

employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.